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DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

Volume 17

January 1, 1985 through May 13, 1985
(Cite as 17 FLRA—)

FEDERAL LABOR RELATIONS AUTHORITY
Washington, D.C. 20424

I

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

MEMBERS

Honorable HENRY B. FRAZIER III, *Acting Chairman*
Honorable WILLIAM J. MCGINNIS, Jr.

GENERAL COUNSEL

Honorable JOHN C. MILLER

FLRA Doc. 1306
Issued January 1986

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Part II. TEXTS OF DECISIONS

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U. S. DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEM

Agency

and

Case No. 0-AR-873

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON LOCALS

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Robert G. Williams filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. By Authority letter dated December 7, 1984, the Union was informed that preliminary examination of the exception disclosed an apparent deficiency in meeting the requirements of the Authority's rules of procedure. Specifically, as was noted in the Authority's letter, the Union's exception failed to comply with section 2425.1(d) of the Regulations.

The Union was also advised in the Authority's letter that further processing of the exception was contingent upon compliance with the designated provision of the Authority's Regulations. In this regard, the Union was informed of the specific action that had to be taken to comply and complete the appeal, and was afforded time in which to take that action. Finally, the Union was advised that failure to comply with the cited requirement within the time limit provided could result in dismissal of the exception.

The Union has made no submission within the time limit provided. Accordingly, the exception is hereby dismissed for failure to comply with the Authority's Regulations.

For the Authority.

Issued, Washington, D.C. January 18, 1985

Harold D. Kessler
Acting Executive Director/Administrator

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY MILITARY
OCEAN TERMINAL, SUNNY POINT,
SOUTHPORT, NORTH CAROLINA

Activity

and

Case No. 0-AR-879

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1708, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator E. H. Rayson filed on behalf of the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

On November 23, 1984, the Union filed exceptions to the Arbitrator's award in the instant case. On January 14, 1985, the Authority issued a deficiency letter to the Union advising it that the exceptions were deficient and affording it an opportunity to perfect its appeal. Thereafter, on January 23, 1985, the Union submitted to the Authority a copy of the Arbitrator's award.

The Arbitrator's award is dated October 15, 1984, and appears to have been served on the parties by mail the same day.

Under section 7122(b) of the Statute, as amended,[1/] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2/] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

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computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority not later than the close of business on November 19, 1984. However, the exceptions were not filed until November 23, 1984. Therefore, the exceptions were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., January 31, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 1857

Union

and

Case No. 0-NG-1096

MCCLELLAN AIR FORCE BASE

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the Union.

The Agency's allegation of nonnegotiability in this case was apparently served on the Union by mail on December 21, 1984. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as section 2429.22 which is also applicable to the computation of the time limit here involved, the petition for review had to be filed, i.e., received in the national office of the Authority, no later than the close of business on January 10, 1985. However, the petition for review was not filed until January 14, 1985, and was thus untimely under the Authority's rules of procedure.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., January 31, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2250

Union

and

Case No. 0-NG-1042

VETERANS ADMINISTRATION MEDICAL
CENTER, MUSKOGEE, OKLAHOMA

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition filed by the Union for review of a negotiability dispute with the Activity. For the reasons stated below, the Union's petition for review must be dismissed.

The record before the Authority in this case indicates that the negotiability dispute between the parties is involved solely with the prospective assignment of one Lester Rouse, an employee of the Activity. Mr. Rouse's assignment was a detail not to exceed 60 days to drive the Activity's shuttle bus route. Prior to the effective date of the change in Rouse's assignment, the Union submitted to management 10 proposals for negotiation concerning the assignment. Management submitted counterproposals on the three proposals they considered to be negotiable. The Union filed the instant petition for review with the Authority in accordance with section 2424.3 of the Authority's Rules and Regulations after the Activity did not serve a written allegation of nonnegotiability upon the Union within 10 days after receipt of the Union's written request for such allegation.

In its statement of position, the Agency informed the Authority that Rouse's assignment was effected on August 6, 1984, and that he resigned from employment with the Veterans Administration effective August 16, 1984. Among other matters, the Agency argues that these facts have rendered this case moot.

Upon careful consideration of the submissions of the parties, it has been determined that since the negotiability dispute between the parties solely involved the prospective reassignment of employee Rouse, who was reassigned and who is no longer an employee, the instant negotiability dispute has been rendered moot. Further, to decide the issues presented

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in the instant case under the circumstances described would be tantamount to issuing an advisory opinion, which is precluded by section 2429.10 of the Authority's Rules and Regulations.

Accordingly, and apart from other considerations, the Union's petition for review is hereby dismissed.

For the Authority.

Issued, Washington, D.C., January 31, 1985

Harold D. Kessler,
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF HEARINGS AND APPEALS,
SOCIAL SECURITY ADMINISTRATION

Activity

and

Case No. O-AR-596

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3615

Union

ORDER DISMISSING EXCEPTIONS

This matter is before the Authority on exceptions to the award of Arbitrator Robert J. Ables filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.*/

The dispute in this matter concerned the Activity's appraisal of a number of employees under certain performance elements and standards. In his award, the Arbitrator did not disturb any of the appraisals but directed the Activity to discontinue applying one of the elements and to also change its prescribed method of determining the overall performance of employees under another element. While the Activity's exceptions to the award were pending before the Authority, the Union requested the Authority to dismiss the exceptions as moot because the Activity had implemented the Arbitrator's award and changed the elements and standards involved. In response, the Activity acknowledged that it had modified the elements and standards, but claimed that the question as to whether the Arbitrator's award was deficient had not been resolved and therefore requested a decision on the merits of its exceptions.

Upon careful consideration of the submissions of the parties, it has been determined that since the performance elements and standards have been changed, the underlying dispute between the parties and the

*/ The Activity's request for a stay of the award was previously granted.

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Arbitrator's award concerning those elements and standards have been rendered moot. In these circumstances, to decide whether the Arbitrator's award is deficient as alleged by the Activity would be tantamount to issuing an advisory opinion, which is precluded by section 2429.10 of the Authority's Rules and Regulations.

Accordingly, the Activity's exceptions are dismissed.

For the Authority.

Issued, Washington, D.C. February 11, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
NATIONAL COUNCIL OF SOCIAL
SECURITY ADMINISTRATION
FIELD OPERATIONS LOCALS,
AFL-CIO

Union

and

Case No. 0-NG-629

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF FIELD OPERATIONS,
BALTIMORE, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises the issue of the negotiability of five Union proposals. The dispute arose in the context of negotiations over the Agency's plan to establish a number of Debt Collection Centers and to staff them by detailing employees from various parts of the Agency. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

Employees detailed to Debt Collection Centers (DCC's) who are otherwise covered by collective bargaining agreements, including interim agreements, shall retain all rights under such agreements while in the DCC's. All employees shall retain their rights under 5 USC 71. (Only the underlined portion is in dispute.)

Union Proposal 3

Leave policies for employees detailed to DCC's shall be those of the employee's applicable agreements, unless superseded by a DCC agreement.

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Union Proposal 5

This Memorandum of Understanding shall become effective on the date it is signed by the parties. This Memorandum of Understanding shall terminate with the conclusion of the DCC experiment. However, if management decides to establish non-experimental DCC's, this Memorandum of Understanding shall be extended until the effective date of an agreement by the parties covering such non-experimental DCC's.

Grievances over the interpretation and application of this Memorandum of Understanding shall be resolved via the applicable negotiated grievance procedure. (Only the underlined portion is in dispute.)

The Agency asserts that the Union does not hold exclusive recognition for those employees who are detailed to the Debt Collection Centers. Therefore, it contends that it has no obligation to negotiate with respect to conditions of employment which pertain to those employees while they are detailed to the Debt Collection Centers. The Union does not refute this assertion.1/ It is well established that proposals are not within the duty to bargain if they apply to employees or positions outside the bargaining unit. See, e.g., American Federation of Government Employees, AFL-CIO, Local 2 and Department of the Army, Military District of Washington, 4 FLPA 450 (1980).2/ The proposals are, therefore, not within the duty to bargain.

Union Proposal 2

The assignment of personnel to DCC's will be accomplished in compliance with appropriate personnel policies and procedures.

In making such assignments for less than 60 days, volunteers will be solicited from within the service area of the DCC's activity and no promotion point credit will be given. For details of 60 days or more, since promotion point credit will be earned, selection will be

1/ The Union did not file a response to the Agency's statement of position. The parties bear the burden of creating a factual record sufficient for the Authority to resolve a negotiability dispute. National Federation of Federal Employees v. FLRA, 681 F.2d 886 at 891 (D.C. Cir. 1982).

2/ It does not appear that the proposals are otherwise outside the duty to bargain as to employees in the unit.

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by means of applicable merit promotion plan with the Area being the area of consideration. The announcement will contain an estimate of the amount of overtime expected. (Only the underlined portion is in dispute.)

The Agency contends, without contradiction by the Union, that the disputed proposal would effectively compel it to select for detail any volunteers regardless of whether or not they were capable of performing the particular work involved in the detail. This interpretation is compatible with the plain language of the proposal and is adopted by the Authority for the purposes of determining whether the proposal is within the duty to bargain. As noted by the Authority in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 613 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982), regarding proposals involving the assignment of employees to details:

> The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under section 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned.

Inasmuch as the proposal in the instant case would compel the assignment of particular employees to the details, it interferes with the Agency's right under section 7106(a)(2)(A) of the Statute to assign employees. It is, therefore, not within the duty to bargain.

Union Proposal 4

> This agreement applies to DCC's established after November 30, 1981, in all SSA Regions. If management initiates any changes in conditions of employment in DCC's covered by this agreement, the union will be accorded all its rights under 5 USC 71 and applicable agreements.
>
> Management will also notify the Regional Vice President in writing of such proposed changes.

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Management will furnish a copy of the weekly District Office Work Report (DOWR) or equivalent for each DCC to the National Council President or designated Coordinator on the current basis. The Council President or designee shall be entitled to request an opportunity to review with the Associate Commissioner of Field Operations quarterly the progress of the DCC's and related matters. Upon request of either party they will bargain about the concerns of either.

Impact and implementation issues not specifically covered by the agreement will be negotiated with the appropriate Regional Vice President or designee. (Only the underlined portion is in dispute.)

The Agency asserts, among other things, that the disputed portion of Union Proposal 4 does not concern "conditions of employment." In this regard it contends that the DOWR is an internal management report on the performance of the district offices which has no relevance to collective bargaining. The Union has not provided the Authority any explanation as to the intent of the proposal. Inasmuch as it is not readily apparent from the face of the proposal as to how it bears a direct relationship to personnel policies, practices, or matters affecting working conditions of unit employees and the Union has provided nothing to support such a finding, the Authority cannot find that the disputed portion of Union Proposal 4 concerns conditions of employment. Therefore, it cannot be found that the proposal is within the duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., February 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr. Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1931

Union

and

Case No. 0-NG-1103

U.S. DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION
CONCORD, CALIFORNIA

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained.

The Agency's allegation of nonnegotiability in this case was apparently served on the Union by mail on January 3, 1985. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on January 23, 1985. However, the petition for review was not filed until February 11, 1985, and thus was untimely under the Authority's rules of procedure.

Accordingly, as the Union's petition for review was untimely filed, and

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apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 19, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2303

Union

and

Case No. O-NG-1064

METROPOLITAN WASHINGTON
AIRPORTS, FEDERAL AVIATION
ADMINISTRATION, U.S. DEPARTMENT
OF TRANSPORTATION

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the Union.

From the record before the Authority, it appears that by letter dated August 24, 1984, the Union requested a negotiability determination on one three part proposal and on a second proposal. It appears further that by letter dated August 31, 1984, the Agency responded, alleging that these two proposals, as well as a third proposal not involved herein, are nonnegotiable. The Union states that it did not appeal the Agency's August 31st allegation but rather, sought to resolve the issues through additional negotiations. The Union states further that when an additional negotiation session failed to resolve the issues, the Union, by letter dated October 15, 1984, requested a negotiability determination on what it characterizes as a "clarified" proposal. The Agency responded by letter of October 23, 1984, reiterating its declaration of nonnegotiability

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dated August 31, 1984. The Union then filed the instant negotiability appeal on October 29, 1984, or within 15 days from the date of service of the Agency's letter of October 23, 1984.

It is well settled that a petition for review must be filed within 15 days from the date of service on the Union of an Agency nonnegotiability allegation. See, e.g., National Treasury Employees Union, Chapter 226 and U.S. Department of Agriculture, Food and Drug Nutrition Service, 15 FLRA No. 19 (1984). In this case, the Agency, in response to a written request from the Union, determined on August 31, 1984, that two proposals concerning the designation of a "post of duty," and the providing of compensation and travel expenses when an employee is detailed or reassigned from one designated post of duty to another were inconsistent with Government-wide regulations and therefore, nonnegotiable.

Although the Union contends that its letter of October 15, 1984, constitutes a separate request for a negotiability determination on a "clarified" proposal resulting from the additional negotiation session of October 1, 1984, such contention cannot be sustained. The record clearly indicates that the proposal set forth in the October 15, 1984, request is merely a recombination of some of the parts of the original three part proposal which the Agency previously determined, on August 31, 1984, to be nonnegotiable. The recombination of those parts effected no changes in the substance or language of the parts.

Thus, while the Union's petition filed with the Authority on October 29, 1984, was filed within 15 days from the date of service of the Agency's letter of October 23, 1984, that letter was, in essence, only a restatement of the earlier allegation. It is therefore clear that the Union's petition in this case seeks review of the Agency's allegation of August 31, 1984. As already indicated, the Union's petition was not filed with the Authority until October 29, 1984, or more than one month later. Thus, the Union's petition was untimely filed under the Authority's rules of procedure.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 21, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL GCC 1

Union

and

Case No. 0-NG-1052

DEPARTMENT OF ENERGY

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review must be dismissed.

The record in this case indicates that on about July 23, 1984, the local parties executed a collective bargaining agreement and submitted it to the agency head for review and approval pursuant to section 7114(c) of the Statute. Subsequently, in a memorandum addressed to the Administrator of the activity, the Department of Energy disapproved several provisions in the local parties' agreement as contrary to Agency regulation. The Union was apparently notified of the Agency's determination on August 29, 1984.

Section 7114(c)(3) of the Statute provides that an agreement which has not been approved or disapproved by the Agency involved within 30 days after the date of its execution becomes effective and binding on the parties on the 31st day, without the approval of the Agency, subject only to the requirements of the Statute and any other applicable law, rule or regulation.

Consequently, since the Agency's disapproval was served on the Union more than 30 days after the contract was executed, the entire agreement as negotiated and executed by the parties became effective and binding on August 23, 1984. Thus, the petition for review raises no dispute concerning the terms of such agreement which is cognizable under section 7117 of the Statute.

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However, our conclusion that the instant petition is not cognizable in the present proceeding does not, of course, mean that any provisions in the agreement which are contrary to the Statute or any other applicable law, rule or regulation, are thereby enforceable. Rather, a question as to the validity of such provisions may be raised in other appropriate proceedings (such as grievance arbitration and unfair labor practice proceedings) and, if the agreement provisions are there found to be violative of the Statute or any other applicable law, rule or regulation, they would not be enforceable but would be deemed void and unenforceable. See, American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, Redstone Arsenal, Alabama, 4 FLRA 361 (1980); American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, Redstone Arsenal, Alabama, 4 FLRA 363 (1981); and Point Mugu Joint Council of National Association of Government Employees, Local R12-33 and National Federation of Federal Employees, Local 1374 and Department of the Navy, Pacific Missile Test Center, Point Mugu, California, 8 FLRA 389 (1982).

Accordingly, since the Union's appeal does not meet the conditions for review under section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, and apart from other considerations,

IT IS HEREBY ORDERED that the Union's appeal be, and it hereby is, dismissed.

For the Authority.

Issued, Washington, D.C., February 22, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

and

Case No. 3-CA-30233

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 32, AFL-CIO

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's Order Transferring Case to the Federal Labor Relations Authority in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

The complaint alleges that the Office of Personnel Management (Respondent) has failed and refuses to comply with section 7121(b)(3)(C) and 7122 of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to implement the Authority's decision in Office of Personnel Management, Washington, D.C., 9 FLRA 676 (1982) in violation of section 7116(a)(1),(5) and (8) of the Statute.

The Respondent terminated the employment of Nathanial K. Brooks, a probationary claims examiner in the Retirement Claims Division on August 22, 1980. Thereafter, Lewis filed a grievance under the negotiated grievance procedure. At a hearing before Arbitrator Seymour Strongin, the Respondent argued as a threshold matter that the arbitrator lacked jurisdiction to consider the merits of the grievance insofar as it concerned the Respondent's decision to remove a probationary employee. On April 20, 1981 the arbitrator issued his decision sustaining the grievance and directing that the grievant be given back pay and promoted to a GS-7. The Respondent filed timely exceptions to the award with the Authority pursuant to section 7122 of the Statute. On July 28, 1982 the Authority issued its decision modifying the arbitrator's award and finding that the grievant should be reinstated as a GS-5 and given back pay as a GS-5 from the date of his termination. By letter dated August 6, 1982, the Union requested that the Authority's decision be implemented. Thereafter, the Respondent informed the Union that it disagreed with the Authority's ruling concerning the right of probationary employees to grieve their separation during their probationary period and stated that it did not intend to implement the Authority's decision.

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The United States Court of Appeals for the District of Columbia Circuit recently held in Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), that a proposal to make the termination of probationary employees grievable and arbitrable under the parties' collective bargaining agreement was inconsistent with law and regulation. Thereafter, in applying the court's decision, the Authority concluded in U. S. Department of Labor, Labor-Management Services Administration, Cleveland, Ohio and National Union of Compliance Officers, 13 FLRA No. 109 (1984),*/ "that in enacting the [Statute] Congress did not intend grievance and arbitration procedures negotiated under the Statute to cover grievances concerning the termination of probationary employees . . . . To the extent that previous decisions of the Authority are to the contrary, they will no longer be followed." Thus, in following the court's decision, the Authority concluded that grievances over the termination of probationary employees are as a matter of law not cognizable under a grievance-arbitration procedure negotiated under the Statute.

The instant case involves what is now clearly established law pertaining to the arbitration over the termination of probationary employees and presents no threshold question or any other question of interpretation or statutory construction. As the Authority's earlier decision in Office of Personnel Management, Washington, D.C., 9 FLRA 676 (1982), pertaining to an arbitration award granted to a probationary employee, is now inconsistent with the established law and regulation, it follows that the Respondent's refusal to implement the Authority's decision in the matter cannot be held to be violative of the Statute. Accordingly, the Authority shall order that the instant complaint be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-30233 be, and it hereby is, dismissed.

Issued, Washington, D.C., February 26, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ See also Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 3342, 14 FLRA No. 33 (1981).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE, NATIONAL GUARD
BUREAU, INDIANA AIR NATIONAL GUARD
INDIANAPOLIS, INDIANA

Respondent

and

Case No. 5-CA-1202

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3029, AFL-CIO

Charging Party

and

DEPARTMENT OF DEFENSE, NATIONAL GUARD
BUREAU, INDIANA AIR NATIONAL GUARD
INDIANAPOLIS, INDIANA

Respondent

and

Case No. 5-CA-1262

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3098, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled consolidated proceeding, granting the General Counsel's Motion for Summary Judgment, finding that the Respondent had engaged in certain unfair labor practices and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Respondent filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings*/ of the

*/ In its exceptions, the Respondent raises the same jurisdictional issue argued before the Judge. The Authority agrees with the Judge's ruling; Respondent is clearly an agency within the meaning of section 7103(a)(3) of the Statute. Indeed, while that section of the Statute specifically excludes certain agencies, the National Guard is not among them.

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Judge and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order only to the extent consistent herewith.

In Case No. 5-CA-1262, the Authority adopts the Judge's finding, for the reasons he expressed, that the Respondent violated section 7116(a)(1) and (6) of the Statute by refusing to implement the Decision and Order of the Federal Service Impasses Panel (FSIP) in Case No. 80 FSIP 39(a), requiring the parties to adopt language in their collective bargaining agreement concerning "Hours of Work, Travel and Temporary Duty, and Grooming Standards." However, contrary to the Judge, the Authority finds that the Respondent did not violate section 7116(a)(1) and (6) of the Statute by refusing to follow the FSIP Decision requiring the parties to adopt language in their collective bargaining agreement concerning "Wearing of the Military Uniform, Special Equipment, and Maternity Clothing," all of which dealt with the wearing of the military uniform. With regard to similar circumstances in Case No. 5-CA-1202, the Authority also finds, contrary to the Judge, that the Respondent's refusal to follow the FSIP Decision in Case No. 81 FSIP 63 requiring the parties to adopt language in their collective bargaining agreement concerning "Technician Uniform and Dress" and to retain language of their current contract concerning "Protective Clothing and Equipment" is not a violation of section 7116(a)(1) and (6) of the Statute. All of the proposals in Case No. 5-CA-1202 deal with the wearing of the military uniform.

Subsequent to the issuance of the Judge's Decision in these two cases, the Authority issued its Decision and Order upon Remand in Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA No. 65 (1984), petition for review filed, New York Council, Association of Civilian Technicians v. FLRA, No. 84-4128 (2nd Cir. Sept. 11, 1984), in which it held that the determination by the National Guard Bureau that technicians must wear the military uniform while performing technician duties constitutes management's choice of "methods, and means of performing work" within the meaning of section 7106(b)(1) of the Statute, and thus, while this requirement may be bargained at the election of the agency, it is not within the duty to bargain. Consequently, the Authority found that the failure of the Respondents to cooperate in the final Decision and Order of the Panel was not violative of section 7116(a)(1) and (6) of the Statute. Based on this rationale as expressed more fully in Division of Military and Naval Affairs, State of New York, the Authority finds that the failure in these cases of the Respondent, Indiana Air National Guard, to comply with the final Decisions and Orders of the Federal Service Impasses Panel dealing with the wearing of the military uniform did not constitute a violation of section 7116(a)(1), (5) and (6) of the Statute. Accordingly, the allegations in these cases in that regard shall be dismissed.

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ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Defense, National Guard Bureau, Indiana Air National Guard, Indianapolis, Indiana shall:

1. Cease and desist from:

(a) Failing or refusing to cooperate in and comply with the Decision and Order of the Federal Service Impasses Panel in Indiana Air National Guard, Hulman Field, Terre Haute, Indiana, and Local 3098, American Federation of Government Employees, AFL-CIO, Case No. 80 FSIP 39(a) (1981), regarding "Hours of Work, Travel and Temporary Duty, and Grooming Standards."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the Decision and Order of the Federal Service Impasses Panel in 80 FSIP 39(a) regarding "Hours of Work, Travel and Temporary Duty, and Grooming Standards."

(b) Post at its facilities wherever unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding General, Indiana Air National Guard, or his designee, and shall be posted for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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IT IS FURTHER ORDERED that the complaint in Case No. 5-CA-1202 and that portion of the complaint dealing with proposals on the wearing of the military uniform in Case No. 5-CA-1262 be, and they hereby are, dismissed.

Issued, Washington, D.C., February 26, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to cooperate in and comply with the Decision and Order of the Federal Service Impasses Panel in Indiana Air National Guard, Hulman Field, Terre Haute, Indiana, and Local 3098, American Federation of Government Employees, AFL-CIO, Case No. 80 FSIP 39(a) (1981), regarding "Hours of Work, Travel and Temporary Duty, and Grooming Standards."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the Decision and Order of the Federal Service Impasses Panel in 80 FSIP 39(a) regarding "Hours of Work, Travel and Temporary Duty, and Grooming Standards."

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

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If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority whose address is: Suite 1359-A, 175 W. Jackson Boulevard, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE, NATIONAL GUARD BUREAU, INDIANA AIR NATIONAL GUARD, INDIANAPOLIS, INDIANA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3029, AFL-CIO Charging Party	Case No. 5-CA-1202
and DEPARTMENT OF DEFENSE, NATIONAL GUARD BUREAU, INDIANA AIR NATIONAL GUARD, INDIANAPOLIS, INDIANA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3098, AFL-CIO Charging Party	Case No. 5-CA-1262

Claire R. Morrison, Esq.
For General Counsel of FLRA

Michael A. Kiefer, Esq.
For Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

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DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), 92 Stat. 1191, 5 U.S.C. §7101 et seq.

On June 22, 1981 a charge was filed in Case No. 5-CA-1202 by American Federation of Government Employees (AFGE), Local 3029, AFL-CIO (herein called AFGE Local 3029) against Department of Defense, National Guard Bureau, Indiana Air National Guard, Indianapolis, Indiana, (herein called National Guard and/or Respondent) alleging that Respondent violated Sections 7116(a)(1), (2), (5), (6) and (8) of the Statute. The above described charge was amended on July 27, 1981 alleging violation of Section 7116(a)(1), (5) and (6) of the Statute. On August 10, 1981 American Federation of Government Employees (AFGE), Local 3098, AFL-CIO (hereinafter called AFGE Local 3098) a charge was filed in Case No. 5-CA-1262 against National Guard alleging that Respondent violated Section 7116(a)(1), (5) and (6) of the Statute. On August 28, 1981, based upon the foregoing, the General Counsel of the Federal Labor Relations Authority (FLRA), by the Director for Region 5, issued an Order Consolidating Cases, Complaint and Notice of Hearing alleging that Respondent violated Section 7116(a)(1), (5) and (6) of the Statute because Respondent failed and refused to bargain in good faith concerning the issue of civilian attire and protective clothing and equipment for bargaining unit employees and because Respondent failed and refused to cooperate in the impasse procedures and decision. On September 28, 1981 Respondent filed a Consolidated Motion to Dismiss and Answer and on October 2, 1981 filed an Amended Consolidated Motion to Dismiss and Answer. National Guard's Answer admitted certain matters but denied that Respondent had violated the Statute. The General Counsel of FLRA filed a Response and Opposition to Respondent's Amended Motion to Dismiss and General Counsel's Motion For Official Notice. Respondent then filed a reply to this "Response" of the FLRA General Counsel. In addition to the Motion to Dismiss and Answer and the Amended Consolidated Motion to Dismiss and Answer, which was forwarded to the office of Administrative Law Judges, Respondent filed a Motion to Compell Interrogatories, directed to Howard Solomon, Executive Director of the Federal Service Impasses Panel (FSIP); Motion for Depositions to be taken of every member of FSIP; and Petition to Revoke Subpena which had been served upon Alfred Ahner, Adjutant General of Indiana. The General Counsel filed Oppositions to each of these Motions and Petitions. All said matters will be disposed of later in this Decision. The General Counsel for the FLRA filed a Motion For Summary Judgment on October 7, 1981 and on November 27, 1981 Respondent filed Respondent Indiana Air National Guard's Memorandum in Opposition to the General Counsel's Motion For Summary Judgment and Statement of Material Facts.

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It has been recognized that summary judgment procedures and motion to dismiss are appropriate procedures under the Statute to avoid useless, expensive and time consuming trials where there are no genuine issues of material fact to be tried. State of Nevada National Guard, 7 FLRA No. 37 (1981) (hereinafter called the Nevada National Guard Case). Upon examination the General Counsel's Motion For Summary Judgment and Respondent's Response and Respondent's Amended Consolidated Motion to Dismiss and the General Counsel's Response, it appears that there are no genuine issues of material fact[1/] and only legal issues are involved. All parties have had an opportunity to present written argument concerning such legal issues.

General Counsel's Motion for Summary Judgment is hereby granted[2/] in accordance with the following:

Findings of Fact

At all times material herein, Respondent maintained a facility in Fort Wayne, Indiana (hereinafter called the Fort Wayne Activity) and a facility in Terra Haute, Indiana (hereinafter called the Terra Haute Activity). At all times material herein National Guard has recognized AFGE Local 3029 as the exclusive collective bargaining representative for a unit that includes all federally paid air technicians at the Fort Wayne Activity and has recognized AFGE Local 3098 as the exclusive collective bargaining representative for a unit that includes all employees of the National Guard at the Terre Haute Activity.

At all times material herein, Major General Alfred Ahner, Adjutant General; Lt. Col. Ronald Beretta, Personnel Management Specialist; Major William V. Miller, Assistant Aircraft Maintenance Officer; and Lt. Col. Francis D. Cramer, Base Services Officer, have been supervisors and/or agents of the National Guard.

On May 20, 1980, Robert J. Brendt, on behalf of AFGE Local 3029 and Major General Alfred A. Ahner and Col. Dale Smiley, on behalf of the National Guard, entered into a Memorandum of Understanding for Negotiation of a Collective Bargaining Agreement. The Memorandum, which was effective upon signing, provided the ground rules for negotiating the collective bargaining agreement including a provision that in the event an impasse was reached and mediation efforts were unsuccessful, "either party may request that the impasse be submitted to the Federal Service Impasses Panel subject to the regulations of the Panel ..." On March 11, 1981 Martin B. Smith, on behalf of AFGE Local 3029 submitted a Request

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1/ All alleged issues of material fact are hereinafter disposed of.

2/ Respondent's Motion to Dismiss is accordingly denied.

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for Assistance to FSIP with respect to the issue of technician uniform and dress and on a related issue of protective clothing and equipment.

On May 22, 1981 FSIP, through its Executive Director Howard Solomon, issued a Decision and Order in State of Indiana, Indiana Air National Guard, Case No. 81 FSIP 63, directing National Guard to adopt the AFGE Local 3029's proposal on technician uniform and dress and directing the parties to withdraw their proposals regarding protective clothing and equipment and retain the language of their current contract. Respondent has not complied with Decision and Order of FSIP issued in Case No. 81 FSIP 63.

On February 15, 1978, Larry K. Austin and David D. Smith, on behalf of AFGE Local 3098, and Major General Alfred F. Ahner and Col. Frank Hettlinger, on behalf of the National Guard, entered into a Memorandum of Understanding for Negotiation of a Collective Bargaining Agreement, which was effective upon signing. This Memorandum provided in the event of an impasse and mediation efforts were not successful, "either party may request that the impasse be submitted to the Federal Service Impasses Panel subject to the regulations of the Panel." On May 28, 1980, Larry Austin, on behalf of the AFGE Local 3098, submitted a Request for Assistance to FSIP in which he requested the assistance of FSIP on several issues, including, but not limited to, hours of work, travel and temporary duty, grooming standards, wearing of the military uniform, special equipment, and maternity clothing. On July 8, 1980, FSIP, in Case No. 80 FSIP 39, informed AFGE Local 3098 that FSIP was declining to assert jurisdiction inasmuch as it had been determined that voluntary efforts to reach settlement had not been exhausted. FSIP directed that negotiations should be resumed with mediation assistance as necessary. In or about March 1981, AFGE Local 3098 submitted a memorandum to the FSIP requesting the assistance on several issues, including hours of work, travel and temporary duty, grooming standards, wearing of the military uniform, special equipment and maternity clothing.

On July 9, 1981, the FSIP issued its Decision and Order on the issues presented to it by AFGE Local 3098 in Indiana Air National Guard, Hulman Field, Case No. 80 FSIP 39(a). On July 22, 1981, AFGE Local 3098, by means of a memorandum, requested that Respondent set a date for a meeting for the settlement of the items decided by the FSIP in Case No. 80 FSIP 39(a). On August 5, 1981, National Guard, by its agent, Lt. Col. Francis D. Cramer, wrote a memorandum to the Union stating that Respondent considered the FSIP Decision and Order in Case No. 80 FSIP 39(a) to be in error regarding its decision on uniform and travel issues. Respondent further stated that it was indefinitely postponing further contract negotiations with AFGE, Local 3098. National Guard has at no time complied with the FSIP Decision and Order issued by in Case No. 80 FSIP 39(a).

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Discussion and Conclusions

Respondent filed a Motion to Dismiss the subject complaint because FSIP and FLRA "have no jurisdiction over the Indiana Air National Guard and further, for the reason that Consolidated Complaint fails to name the proper party respondent, an agency within the meaning of 5 U.S.C. 7103(a)(3)." National Guard's contentions that FSIP and FLRA have no jurisdiction over National Guard and that National Guard is not an agency subject to the Statute are rejected. FSIP and FLRA have jurisdiction over National Guard and the Air Technicians and other employees and National Guard clearly is an agency subject to the requirements of the Statute. State of California National Guard Case, 8 FLRA No. 11 (1982) (hereinafter called the California National Guard Case; and Nevada National Guard Case, supra and Divison of Military and Naval Affairs, State of New York, 8 FLRA No. 33 (1982) (hereinafter called the New York Case.)

In relation to Respondent's contention that the wrong party Respondent was named in the subject cases, National Guard seems to urge that the parties to the two Memoranda of Understanding are the two AFGE Locals, respectively, and Alfred F. Ahner, the Adjutant General, State of Indiana. Respondent urges that statutorily the air technicians are employed by the Adjutant General and that the Adjutant General was the party dealing with the two AFGE Locals and that he was somehow dealing as an individual, and not as an agent of the National Guard. Thus, Respondent disputes the legal conclusion that the memoranda were between National Guard and the two respective AFGE locals. It must be noted that Respondent admitted that Adjutant General Ahner was a supervisor and/or agent of the National Guard and that Respondent has recognized both AFGE Locals as the exclusive collective bargaining representatives for its respective activities. Additionally, Adjutant General Ahner signed the two memoranda over the title "Major General, Ind. ARNG, the Adjutant General", and they were each signed by the local in "ANG, Air Commander." In light of all of the foregoing it is concluded that the two memoranda were between Respondent and the respective AFGE local and that National Guard was the appropriately named Respondent. Cf. State of California National Guard Case, supra; and Nevada National Guard Case, supra. In any event, as is noted above the AFGE locals were the collective bargaining representatives of the air technicians employed by Respondent and it was these AFGE locals that requested FSIP's assistance with respect to collective bargaining. The collective bargaining relationship was between the AFGE locals and Respondent, FSIP's Decisions and Orders ran to Respondent and thus obliged Respondent to act.

Respondent similarly urges that Decisions and Orders issued by FSIP in Cases Nos. 80 FSIP No. 39(a) and 81 FSIP No. 63 were beyond the authority granted FSIP and were inconsistent with Chapter 74 Titles, United States Code. Such contentions have been rejected by the FLRA California National Guard Case, supra; Nevada National Guard Case, supra; and New York Case, supra.

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Finally, Respondent urges that the Motion For Summary Judgment should be denied because Respondent has not completed its discovery. Respondent urges that the discovery would disclose issues of fact which would justify setting aside the FSIP award. Respondent then states in its Opposition that these facts are unknown to the Respondent, but are solely within the knowledge of the FSIP members, the objects of discovery procedures.

The allegedly disputed facts involve two basic assertions. The first deals with whether the FSIP Decisions and Orders were legally and statutory sufficient. It is concluded that FLRA has determined that FSIP Decisions and Orders similar to the two involved in the subject case are legally and statutory sufficient. California National Guard Case, supra; Nevada National Guard Case, supra; and New York Case, supra. Respondent also alleges that the action of FSIP resulted from bias and prejudice. It is now clear that the propriety of FSIP Decisions are reviewable in this proceeding. Nevada National Guard Case, supra. The extent of reviewability of the FSIP Decisions was discussed at length by Judge Arrigo in his Decision in the New York Case, supra, but FLRA in its Decision chose specifically not to adopt Judge Arrigo's reasoning and not to explicate the scope of review of FSIP Decisions. However, in light of the following, it is clear that whatever the scope of review of FSIP Decisions, the Decisions in question would be affirmed. New York Case, supra. Respondent contends that, if permitted to pursue discovery with respect to the members of FSIP, facts would be elicited which would establish bias and prejudice on the part of FSIP. In support of its contention that discovery would successfully produce such evidence of bias and prejudice Respondent relies solely on an affidavit of Milton Thomas Gerock, an Major in the North Carolina Air National Guard. Maj. Gerock attended a labor relations course in August of 1979 at which FSIP Member Beverly K. Schaffer spoke. According to Maj. Gerock FSIP Member Schaffer allegedly stated that "all but a very few of the matters considered by FSIP, to that point, concerned the wearing of the military uniform by Members of the National Guard. She then turned to me and said, in a tone of exasperation, that FSIP had decided the uniform issue once and for all and that if any other group to pursue this issue would be a waste of fine ...." It is concluded that FSIP Member Schaffer's statement is very vague and ambiguous and is not sufficient to establish bias and prejudice on her part or that of FSIP and is not sufficient to permit Respondent to engage in a fishing expedition in order to try to discover if there is any evidence extant to sustain its allegation of bias and prejudice. Accordingly, it is concluded that Respondent's allegation is too conjectural and therefore, there is no substantial issue of material fact.3/

3/ Accordingly, to the extent any of the motions for discovery are pending before me they are denied.

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Finally, based on the FLRA's decisions in the California National Guard Case, supra, the New York Case, supra, the Nevada National Guard Case, supra, and the rational therein, and because Respondent has not shown any legal justification for its non-compliance with the two FSIP Decisions, it is concluded that Respondent's failure to comply with the Decisions and Orders of FSIP in Cases. No. 81 FSIP 63 and 80 FSIP 39(a) constitutes violations of Sections 7116(a)(1) and (6) of the Statute and therefore General Counsel of the FLRA's Motion For Summary Judgment is granted and Respondent's Motion to Dismiss is denied. In view of these findings it is unnecessary to pass upon whether the Respondent's conduct also violated Sections 7116(a)(5) of the Statute.

Having found and concluded that Respondent violated Section 7116(a)(6) and (1) of the Statute; I recommend that the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Defense, National Guard Bureau, Indiana Air National Guard shall:

1. Cease and desist from:

(a) Failing and refusing to comply and cooperate with Decisions and Orders of the Federal Service Impasses Panel issued in Case Nos. 80 FSIP 39(a) and 81 FSIP 63.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to carry out the purposes and policies of Executive Order 11491, as amended, and the Federal Service Labor-Management Relations Statute:

(a) Comply and cooperate forthwith with Decisions and Orders of the Federal Service Impasses Panel issued in Case Nos. 80 FSIP 39(a) and 81 FSIP 63.

(b) Post at its facilities copies of the attached Notice marked Appendix on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commanding General, Indiana Air National Guard, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards

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and other places where notices to employees are customarily posted. The Commanding General shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 5, Federal Labor Relations Authroity, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: March 8, 1982
Washington, D.C.

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APPENDIX

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with Decisions and Orders of the Federal Service Impasses Panel issued in Case Nos. 80 FSIP 39(a) and 81 FSIP 63.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply and cooperate forthwith with Decisions and Orders of the Federal Service Impasses Panel issued in Case Nos. 80 FSIP 39(a) and 81 FSIP 63, and will otherwise cooperate in impasses procedures and decisions as required by the Federal Service Labor-Management Relations Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region Five, whose address is 175 West Jackson Boulevard, Chicago, Illinois 60604 and whose telephone number is (312) 886-3468.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. O-AR-601

U.S. CUSTOMS SERVICE

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Thomas N. Rinaldo filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The parties submitted to arbitration the issue of whether the August 1982 performance appraisal of the grievant was in violation of Article 16 of the parties' collective bargaining agreement. Article 16 pertinently provides that "performance elements and performance standards ... will be reasonable for each position." The Arbitrator evaluated the performance element of "overtime turndowns" under the nonquantitative requirement of the parties' agreement and found that the element was not reasonable. Consequently, he determined that the grievant's disputed appraisal should not take into account the grievant's performance under that element. Because the record established that the grievant in that event would have received the highest overall performance appraisal of "outstanding," the Arbitrator as his award ordered the grievant's 1981-82 overall annual appraisal amended accordingly.

As one of its exceptions the Agency essentially argues that the award is contrary to section 7106(a) of the Statute. The Authority agrees.

The Authority has repeatedly recognized that the plain language of section 7106 provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. E.g., American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981), aff'd sub nom. AFGE Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied 103 S. Ct. 2085 (1983). Therefore, the Authority has consistently held that no arbitration award may improperly deny an agency the authority to exercise its rights under that section or result in the substitution of the arbitrator's judgment for that

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of the agency in the exercise of those rights. Id.; American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 6 FLRA 314, 321 (1981). In particular, the Authority has held that identification of critical elements constitutes an exercise of management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1981), affirmed sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982); Saint Lawrence Seaway Development Corporation, 5 FLRA 70. In terms of this case, the Authority finds that the provision of the agreement found violated by the Arbitrator and consequently the award enforcing that provision in resolving the grievance are contrary to section 7106(a)(2)(A) and (B) as an improper interference with management's right to identify critical elements. See Saint Lawrence Seaway Development Corporation; American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA No. 127 (1984) (union proposal 3) (in which case the Authority found the proposal that performance standards would be fair and equitable to be outside the duty to bargain as interfering with management's rights to assign work and direct employees under section 7106(a)(2)(A) and (B) of the Statute). Both the agreement provision and the award improperly impose a substantive limitation on management's discretion to identify which employee tasks are critical. Moreover, by imposing such a limitation, the agreement provision prompted the interference by grievance and arbitration with management's rights. The provision provided the basis for the review by the Arbitrator of the Agency's identification of "overtime turndowns" as a critical element and permitted the substitution of judgment by the Arbitrator for that of management as to how the Agency should be run. Id. Accordingly, the award is set aside as contrary to section 7106(a)(2)(A) and (B) of the Statute.*/

Issued, Washington, D.C. February 26, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision, the Agency's other exception need not be addressed.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and

Case No. 1-CA-854

PORTSMOUTH FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain of the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and Recommended Order. See Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA No. 137 (1984).*/

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Portsmouth Naval Shipyard, Portsmouth, New Hampshire shall:

*/ In view of this conclusion, the Authority finds it unnecessary to determine whether the Respondent's conduct was also in violation of section 7116(a)(5) of the Statute.

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1. Cease and desist from:

(a) Failing and refusing to continue to implement Arbitrator William J. Fallon's January 31, 1981 arbitration award by discontinuing Environmental Differential Pay (EDP) payments to employees working in the Rubber Molding and Curing Area of Building 60 on July 27, 1981.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with Arbitrator William J. Fallon's January 31, 1981 arbitration award by paying the eight percent (8%) EDP ordered by the arbitrator to the appropriate employees working in the Rubber Molding and Curing Area of Building 60 and make whole any employee who worked in that area during the interim by paying EDP retroactive to July 27, 1981.

(b) Post at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., February 26, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to continue to implement Arbitrator William J. Fallon's January 31, 1981 arbitration award by discontinuing Environmental Differential Pay (EDP) payments to employees working in the Rubber Molding and Curing Area of Building 60 on July 27, 1981.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by the Statute.

WE WILL fully comply with Arbitrator William J. Fallon's January 31, 1981 arbitration award by paying the eight percent (8%) EDP ordered by the arbitrator to the appropriate employees working in the Rubber Molding and Curing Area of Building 60 and make whole any employee who worked in that area during the interim by paying EDP retroactive to July 27, 1981.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116 and whose telephone number is: (617) 223-0920.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE NAVY PORTSMOUTH NAVAL SHIPYARD (PORTSMOUTH, NEW HAMPSHIRE) Respondent		
and		Case No. 1-CA-854
PORTSMOUTH FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO Charging Party		

A. Gene Niro, Esq.
For Respondent

Richard D. Zaiger, Esq.
Marilyn Roth, Esq.
For General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410, et seq.

A charge was filed on July 29, 1981 and amended on September 30, 1981 by the Portsmouth Federal Employees Metal Trades Council, AFL-CIO (hereinafter called the Union and/or MTC), against Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire (hereinafter called Respondent and/or Portsmouth Naval Shipyard). Pursuant to the above

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described charge and amended charge, the General Counsel of the FLRA, by the Director of Region I, issued a Complaint and Notice of Hearing on October 9, 1981 alleging that Portsmouth Naval Shipyard violated Sections 7116(a)(1), (5), and (8) of the Statute by failing to comply with an arbitrator's award. Respondent filed an Answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in Portsmouth, New Hampshire. Respondent and the General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were submitted and have been duly considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein MTC has been the collective bargaining representative for a unit of ungraded and GS employees employed by the Portsmouth Naval Shipyard, with certain exclusions not here relevant, and MTC and Respondent have been parties to a collective bargaining agreement. Employees in the rubber molding and curing area are within the unit described above.

Article 20 of the collective bargaining agreement provides that Respondent "shall assign environmental pay to unit employees engaged in hazardous work . . . to the extent permitted and prescribed by applicable regulations." Article 20 further provides for employees and the Union to grieve over any work situation that they feel meets the criteria for an environmental differential found in the regulations[1/] for which Respondent refuses to pay such a differential.

MTC filed a grievance that raised many safety issues including, inter alia, the entitlement of employees in the rubber molding and curing area to environmental differential pay. The grievance was taken to arbitration and the matter was heard by Arbitrator William J. Fallon. The matter was presented to Arbitrator Fallon during 4 days of hearing, during which the parties had an opportunity and did submit evidence with respect to the various issues raised in the grievance. Arbitrator Fallon issued his Arbitration Decision on January 31, 1981. The Arbitration Decision stated, inter alia:

1/ The regulations in question are appendix J of FPM Supplement 532-1.

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"Since the decision will necessarily be based on the limited evidence presented, it should not be construed to limit the parties at any time in the future, from making a more particularized presentation with additional evidence on any of the health, safety or pay issues considered herein."2/

. . .

"The Independent nature of these two subjects [Environmental Pay Differential and Positive Safety Action] is also confirmed by Article 29, Section 8 of the agreement . . . which indicates that when a health impairing condition is found, the remedy provided is not environmental pay, but rather a prohibition of further work until the unsafe condition has been corrected or until adequate protective clothing and/or devices have been provided to affected employees."3/

. . .

"Finally, if the union is dissatisfied with a particular individual determination, the matter would be deemed grievable under Article 34, Section 1 a. . . . and subject to the various steps of the general grievance procedure, as described in Article 34, Section 2 - 5. Or, if the Union has a more generalized grievance, based on the belief 'that a work situation not listed in (Enclosure (2)) meets the criteria of an established environmental differential category found in Appendix J of FPM Supplement 532-1, that complaint shall be filed in accordance with Article 34, Section 5 . . .' (Article 20, Section 4, quoted below, p. A2)."4/

. . .

"Having considered general engineering controls, there remains for our consideration particular controls, if any, warranted by the hazardous nature of the particular chemicals. With respect to ETU, the Arbitrator is prepared to accept the Employer's

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2/ Page 21, Footnote 6 of the Arbitration Decision.

3/ Id of Page 23.

4/ Id at Page 43-44.

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representation that NIOSH has concluded that the handling of encapsulated NA-22f results in no occupational exposure, because it is dustless. Nevertheless, the Arbitrator notes that the manufacturer (Dupont), with the concurrence of Mr. Athanasiou of the Industrial Hygiene Department, and Mr. Nelson, the Shop Instructor, still recommends that women of child-bearing potential should not work with that chemical. The Employer has not complied with this recommendation and should do so in the future.

As noted above, NIOSH has recommended the monitoring of employee exposure to ETU. The Employer should also comply with that recommendation.

Also, as noted above, even in its 'dustless', encapsulated form, when NA-22f is heated - as it is in the curing of rubber - it may be released in vapor form. These vapors should not be breathed, and, therefore, the Arbitrator has already recommended that this problem be controlled by isolation, ventilation and/or respiratory protection. The Employer has claimed that the vapors and smoke released in this area are harmless, having been measured and having produced no test reading in excess of established TLV's. Yet the smoke and vapors were tested for other chemicals-- and not ETU, which, in any event, does not appear to have an established TLV (or ar least the Arbitrator is unable to find evidence as to any TLV). Thus the Employer's tests are not sufficient to prove that there are no ETU vapors being released, and therefore the manufacturer's recommendations should be followed."5/

. . .

"Having considered control measures, there remains for our consideration the question of environmental pay. On the record before us, a high degree hazard differential should be paid to employees working in the molding and curing area at any times when molds were being opened and vapors and smoke, possibly including ETU, were being released. Given

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5/ Id at Page 64-65.

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the lack of ventilation or personal respiratory equipment, there existed and continues to exist a potential for serious injury from exposure to ETU vapors or fumes, which has not been practically eliminated."6/

. . .

As part of his award Arbitrator Fallon provided:

"J. The Employer should monitor the exposure to Ethylene Thiourea of employees assigned to work with it, in accordance with applicable NOISH monitoring procedures."7/

. . .

"The Employer violated Article 20, Section 1 by failing to provide the 8% high degree poison (toxic chemicals) differential in the following instances:

A. To employees working in the rubber molding and curing area when molds are or were being opened, and/or when vapors and smoke were being released, and ETU was a component ingredient of the rubber being manufactured."8/

Arbitrator Fallon's award required compliance by Respondent by March 2, 1981. Respondent complied with the award by paying $150,000 in back pay to affected employees in the rubber molding area and by prospectively paying the eight percent environmental differential pay (EDP).

Beginning March 2, 1981 Portsmouth Naval Shipyard started taking samples in the rubber molding area analyzing for airborne Ethylene Thiourea (ETU). These tests continued during much of March 1981. On March 5 MTC Chief Steward was officially advised of the above described tests. No representative of MTC requested to participate in the testing procedures, but they did review documents relating to the sampling process and were given the NIOSH bulletin on the subject. A copy of the detailed report of the study was forwarded to MTC on June 10, 1981. The report concluded that ETU presence in the air of the rubber molding and

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6/ Id at Page 66.

7/ Id at Page 100.

8/ Id at Page 102-103.

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curing area was not as high as the threshold limit established by the ETU manufacturer, DuPont. There is no official or government formulated or approved threshold limit for ETU in the air.

By letter dated July 20, 1981 Portsmouth Naval Shipyard advised MTC that, as a result of the report, the use of ETU in Building 60 did not meet the criteria for toxic chemical pay as set forth in Appendix J of FPM Supplement 532-1, and, as a result, such pay ". . . to employees who are molding rubber in Building 60 will be paid on a case basis when it appears that exposure to ETU has occurred." On July 27, 1981 Respondent discontinued the eight percent EDP to employees in rubber molding and curing area.

The actual job of the employees exposed to ETU in the rubber molding and curing area has not changed since the Arbitrator's Award. Portsmouth Naval Shipyard did not improve or otherwise change the ventilating system or other working conditions in the rubber molding and curing area since the arbitrator's award. The record does not establish that there has been any change in the exposure to airborne ETU of the employees in the rubber molding and curing area since the arbitrator's award.

The Portsmouth Naval Shipyard did not file any exceptions to Arbitrator Fallon's Award and did not request a stay. Article 35 of the collective bargaining agreement provides that Respondent and the Union can file grievances. In the past when Respondent determined that it was unwarranted, Respondent would discontinue EDP and the Union would file a grievance to resolve the dispute.

Discussion and Conclusions

The General Counsel of the FLRA contends that by discontinuing the eight percent EDP for the employees in the rubber molding and curing area Respondent violated Sections 7116(a)(1), (5), and (8) of the Statute because it violated Arbitrator Fallon's award and Sections 7116(a)(1) and (5) of the Statute because Respondent unilaterally changed a term and condition of employment.

The Statute provides a procedure for appealing to the FLRA if a party is dissatisfied with an arbitrator's award. Both pursuant to the collective bargaining agreement (Article 35 Section 6) and the Statute, if no exceptions are filed to an arbitrator's award, that award is final and binding.9/ In the subject case, Respondent filed no exceptions to Arbitrator Fallon's Award and did not utilize the procedures provided by

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9/ I adopt the reasoning set forth in Department of Defense, Department of the Navy, U.S. Marine Corps, U.S. Marine Corps Air Station, Cherry Point, North Carolina, 4-CA-502, OALJ-82-71 (1982), (hereinafter called the Marine Corps Case) and the cases cited therein.

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the Statute to secure review of the Award. Accordingly, Arbitrator Fallon's Award is final and binding.

In the award Arbitrator Fallon found that "On the record before us a high degree hazard differential should be paid to employees working in the molding and curing area. . . Given the lack of ventilation or personal respiratory equipment, there existed and continues to exist a potential for serious injury from exposure to ETU vapors or fumes, which has not been practically eliminated." Arbitrator Fallon was clearly making a finding that employees working in the rubber molding and curing area are entitled to EDP. He was not merely saying that in the past conditions existed that justified awarding EDP solely for times past. Rather he was clearly finding that employees working under the then existing conditions were entitled pursuant to the collective bargaining agreement to eight percent EDP. It is a decision that quite obviously continues to apply so long as the working conditions in the rubber molding and curing area remain unchanged. Arbitrator Fallon's Award concluded that Respondent violated Article 20 Section 1 of the collective bargaining agreement "by failing to provide eight percent high degree poison (toxic chemicals) differentials . . . to employees working in the rubber molding and curing area . . ." The entire thrust of the Arbitrator's Decision and Award is that pursuant to the collective bargaining agreement employees working in the rubber molding and curing area were and continue to be entitled to the eight percent EDP and that by failing to pay the eight percent Respondent was violating the contract. Accordingly, it is concluded that Arbitrator Fallon's Decision and Award was intended to and did have both retrospective and prospective effect. This is supported by Arbitrator Fallon's invitation to come back to him with additional evidence. This clearly was appropriate only because the Decision was to have prospective and continuing application.

Portsmouth Naval Shipyard did not justify the discontinuance of the eight percent EDP ordered by Arbitrator Fallon on the basis of any change in working conditions in the rubber molding and curing area or because it had improved ventilation or provided the employees with personal respiratory equipment. Rather, Respondent justified its action because it performed studies which, it alleges, show that the ETU level in the rubber molding and curing area was not sufficiently hazardous to justify an eight percent EDP. This, however, was the very matter considered and decided by Arbitrator Fallon. Respondent, after losing the case before Arbitrator Fallon, recognized that it had not submitted sufficiently convincing evidence to persuade Arbitrator Fallon that the rubber molding and curing area was not hazardous. Accordingly, it is attempting to rectify that shortcoming by performing its own tests, making its own determination and then deciding not to comply with Arbitrator Fallon's Decision and Award. This defeats the very purpose of the arbitration process, which is to permit the parties to submit a dispute to an arbitrator of their own choosing and to have that dispute resolved with finality. The absence of finality would frustrate the entire purpose of going to arbitration.

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Respondent urges that it is entitled to refuse to comply with Arbitrator Fallon's Decision and Award and, if MTC was dissatisfied, MTC should file a new grievance and proceed to Arbitration again to seek a new determination of exactly what Arbitrator Fallon had already decided. Presumably if MTC prevailed again, Respondent would contend that Respondent could again refuse to pay EDP and, not being in noncompliance with the arbitrator's decision, require MTC to resort again to arbitration to enforce the very same right. This could, under Respondent's theory, be repeated over and over, until some arbitrator found in the favor of Respondent. Then, if Respondent is to be consistent, presumably MTC would not be bound by such an arbitrator's award and could file a new grievance over the very same employees and work. All of the above could occur, according to Respondent, with absolutely no change having taken place in the working conditions. Such an interpretation of the effect and result of an arbitration proceeding would render arbitration meaningless and does not permit the parties to establish, with any finality, their obligations.

Respondent cites a number of authorities to the effect that an arbitrator's award is not precedential and that the principles, of stare decisis and res adjudicata do not apply to an arbitrator's award. These precedents are inapposite. In those situations the issues involved whether an arbitrator's interpretation of a contract clause is binding in subsequent arbitrations. That is not the situation in the subject case. In the subject case, the precise issue presented and resolved was whether employees in the rubber molding and curing area are entitled to the eight percent EDP. Arbitrator Fallon specifically determined that employees in the rubber molding and curing area are entitled to the EDP. Thus, Respondent's argument that because neither stare decisis nor res adjudicata attaches to arbitration decisions, Arbitrator Fallon's Decision has no prospective affect is rejected. This is further supported by Arbitrator Fallon's Decision wherein he recognized that the record made at the hearing was not as complete as it should have been. Thus he kept jurisdiction over the matter and invited the parties to submit additional evidence on any issue considered. Respondent chose not to abide by Arbitrator Fallon's Decision and not to submit its additional evidence in order to convince Arbitrator Fallon to change his decision. Rather, by discontinuing the EDP, Portsmouth Naval Shipyard chose not to continue to comply with Arbitrator Fallon's award and by so doing Respondent violated Sections 7116(a)(1), (5), and (8) of the Statute. Marine Corps Case, supra.

Having concluded that Respondent failed to comply with Arbitrator Fallon's Decision and Award, I need not reach General Counsel of the FLRA's contention that, apart and distinct from the failure to comply with the arbitrator's award, there was a unilateral discontinuance of an

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existing working condition which violated Sections 7116(a)(1) and (5) of the Statute.10/

Having found that Respondent violated Sections 7116(a)(1), (5), and (8) of the Statute by its failure to continue to comply with Arbitrator Fallon's Decision and Award, it is concluded that a status quo ante remedy is appropriate.

Having found and concluded that Respondent violated Sections 7116(a)(1), (5), and (8) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the arbitration award of Arbitrator William J. Fallon issued on January 31, 1981 by failing and refusing to pay an eight percent Environmental Pay Differential to employees working in the Rubber Molding and Curing Area of Building 60.

(b) In any like or related manner, interfering with restraining or coercing employees in the exercise of

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10/ If it is determined by the FLRA that this issue must be reached I would conclude that the EDP was an existing working condition; that Respondent did not give MTC appropriate advanced notice of its intent to change this working condition and that Respondent presented MTC with an already made and final decision. Accordingly, I would conclude Respondent violated Sections 7116(a)(1) and (5) of the Statute. Cf. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981) and San Antonio Air Logistics Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA No. 22 (1981). Respondent contends that in the past when it unilaterally discontinued EDP, MTC filed a grievance and therefore Respondent urges that somehow this constitutes a waiver of MTC's right to urge such changes as unfair labor practices. No such waiver was here present because MTC did not clearly and unequivocally waive its right, especially when it sought to protect its rights by other means. A party that seeks to protect its right by one means can hardly be interpreted to waive all other means. To so hold would be to unfairly burden a wronged party. Thus Respondent's contention that there was a waiver is rejected.

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rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the arbitration award of Arbitrator William J. Fallon issued on January 31, 1981 by paying an eight percent Environmental Pay Differential to employees in the Rubber Molding and Curing Area of Building 60 and by making whole any employee in the Rubber Molding and Curing Area by making such Environmental Pay Differential retroactive to July 27, 1981.

(b) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an authorized representative and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to insure that the notices are not altered, defaced or covered by other material.

(c) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply with the Order.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: November 30, 1982
Washington, DC

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APPENDIX

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with the arbitration award of Arbitrator William J. Fallon issued January 31, 1981 by failing to pay an eight percent Environmental Pay Differential to employees working in the Rubber Molding and Curing Area of Building 60.

WE WILL NOT in any like or related manner, interfere with restrain or coerce employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the arbitration award of Arbitrator William J. Fallon issued January 31, 1981 by paying an eight percent Environmental Pay Differential to employees in the Rubber Molding and Curing Area of Building 60 and by making whole any employee in the Rubber Molding and Curing Area by making such Environmental Pay Differential retroactive to July 27, 1981.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is (617) 223-1920.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF THE SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION

Activity

and

Case No. 0-AR-608

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3313, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Seymour Strongin filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter concerns the Activity's failure to select the grievant for a grade 14 position for which another employee was selected. The grievant, as a downgraded employee receiving benefits under 5 U.S.C. §§ 5361-5366 (Subchapter VI, Grade and Pay Retention), was entitled to "priority placement" to the grade 14 position as a position at the grade he held prior to his downgrading. See generally FPM Letter 536-1 (Grade and Pay Retention -- Administration of Agency Programs for Training and Placement for Downgraded Employees Including the Development of Classification and Placement Plans). A grievance was filed and submitted to arbitration claiming that as a priority-placement employee, the grievant should have been appointed to the grade 14 position. Although the Arbitrator noted that the employee selected for the position "may well have been superior to the grievant as a candidate for th[e] position," the Arbitrator was of the view that as a priority-placement employee, the grievant was "legally entitled" to have been appointed to the position. Thus, the Arbitrator found that if the grievant had been extended the priority to which he was entitled, he would have been selected. Accordingly, the Arbitrator ordered the grievant appointed to the grade 14 position with backpay and benefits retroactive to the appointment date of the selected employee.

In one of its exceptions, the Agency contends that the award is contrary to management's right to make selections for appointments as set forth in section 7106(a)(2)(C) of the Statute and FPM chapter 335. The Authority agrees.

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The Authority has held in this respect that management's right to make the actual selection for appointment can only be abridged if the arbitrator finds a direct connection between improper agency action and the failure of a specific employee to be selected. E.g., American Federation of Government Employees, Local 12 and United States Department of Labor, 15 FLRA No. 113 (1984). Moreover, the Authority has indicated that the failure to accord an employee the type of consideration required by the priority-placement program in this case cannot constitute the requisite finding of a direct connection between improper agency action and the failure of the employee to be selected for appointment to a position. See United States Air Force, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees Union, Local 916, AFL-CIO, 14 FLRA 642 (1984); Action and Action Employees Union, AFSCME, Local 2027, 11 FLRA 514 (1983). Thus, the Authority concludes that the Arbitrator's finding that the grievant was not extended the priority consideration to which he was entitled does not constitute the requisite finding that but for that unwarranted action, the grievant would have been selected for appointment to the grade 14 position. Consequently, the award is deficient as contrary to management's right to make selections for appointment as set forth in section 7106(a)(2)(C) of the Statute and Requirement 4 of FPM chapter 335, subchapter 1-4 and must be modified to provide an appropriate remedy. See Department of Labor, 15 FLRA No. 113 at 2. Accordingly, the award is modified to provide as follows:*/

> The grievant shall be granted priority consideration for positions of grade, tenure and tour of duty equal to the position from which he was downgraded.

Issued, Washington, D.C., February 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision, it is not necessary to address the Agency's other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BUREAU OF THE MINT,
DENVER, COLORADO

Activity

and

Case No. 0-AR-481

MINT COUNCIL, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator George E. Bardwell filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter arose when the grievant's brother was selected as a supervisor of the third shift to which the grievant was also assigned. The Activity determined that the supervisor-subordinate relationship between the brothers would constitute a nepotism situation prohibited by Chapter 310 of the Federal Personnel Manual. When the grievant declined a reassignment to the second shift for personal reasons, the Activity reassigned him to the day shift, which resulted in the loss of the ten percent night differential pay he had received on the third shift. The Arbitrator found that the grievant was deprived of his third shift assignment in violation of the seniority provisions in the parties' agreement. The Arbitrator thereupon awarded the grievant shift differential pay of three percent to cover the difference between the third and the second shift differentials.

In its exceptions, the Activity alleges, among other things, that the award is not authorized by law. The Authority agrees.

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The legal basis for payment of night shift differential is 5 U.S.C. § 5545(a), which provides for payment of such differential only for regularly scheduled work between the hours of 6:00 p.m. and 6 a.m. In this case, since the grievant was reassigned to the day shift, payment of night differential is not authorized under 5 U.S.C. § 5545(a).

Accordingly, the Arbitrator's award is set aside.*/

Issued, Washington, D.C., February 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision, it is not necessary to address the Activity's other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE

Agency

and

Case No. 3-UC-17

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under section 7112(d) of the Federal Service Labor-Management Relations Statute (the Statute), a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including the contentions of the parties, the Authority finds:

The American Federation of Government Employees, AFL-CIO (AFGE) filed the instant petition seeking to consolidate 11 units of employees in the U.S. Department of Justice (Agency) which it represents exclusively.1/

1/ The petition filed by AFGE originally encompassed 15 units of exclusive recognition. However, as a result of events occurring since that time, four units of employees in the Drug Enforcement Administration are no longer represented by AFGE, and they are no longer encompassed within the consolidated unit sought herein. In addition, another unit of exclusive recognition involved herein, a nationwide unit of Border Patrol employees, was the subject of an RO petition filed by the International Brotherhood of Police Officers (IBPO). United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982), enf. denied sub nom. U.S. Department of Justice v. FLRA, 727 F.2d 481 (5th Cir. 1984). Processing of the instant petition was delayed pending resolution of the question concerning representation. Subsequently, IBPO withdrew its petition, and there is now no longer an impediment to further processing this petition.

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The units presently represented by AFGE and covered by the petition are set forth in the Appendix.[2/]

AFGE describes the proposed consolidated unit as including the following existing bargaining units exclusively represented by AFGE:

> All professional and nonprofessional employees of the Bureau of Prisons and Prison Industries, Inc. [Federal Prison System (FPS)]; all nonprofessional employees of the Immigration and Naturalization Service, including the Border Patrol (INS); all nonprofessional employees of the U.S. Marshals Service (USMS); all professional and nonprofessional employees of the Board of Immigration Appeals (BIA); all nonprofessional employees of the Community Relations Service (CRS); all professional and nonprofessional employees of the U.S. Parole Commission (USPC); and all nonprofessional employees of the U.S. Attorney Offices in the Federal District of New Jersey and the Federal Western District of New York.

The Agency contends that the proposed consolidated unit is not appropriate because it does not meet the three criteria for an appropriate unit set forth in section 7112(a)(1) of the Statute.[3/] In addition, the Agency contends that the petition should be dismissed because the proposed consolidated unit includes employees of the United States

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2/ In addition, AFGE suggested at the hearing that if the Authority found its proposed consolidated unit inappropriate, it would accept one of two alternative units: The first alternative unit would delete from the consolidation the unit at the U.S. Parole Commission and the units at the U.S. Attorney Offices in New York and New Jersey; the second alternative unit would delete, in addition to the aforementioned units, the units at the Community Relations Service and the Board of Immigration Appeals.

3/ Section 7112(a)(1) provides:

> § 7112. Determination of appropriate units for labor organization representation
>
> (a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved[.]

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Parole Commission, which is an independent agency attached to the Agency solely for administrative purposes.

The Agency is a department in the Executive branch under the overall direction of the U.S. Attorney General and his Deputy. According to the record in this case, the Agency has a total of approximately 56,000 employees organized into 6 "bureaus," 14 "offices," 1 "board" and 6 "divisions." The "offices," "board," and "divisions" (OBDs) are collectively considered as a "bureau" for the purposes of administrative support such as personnel and labor relations functions, under the direction of the Assistant Attorney General for Administration (AAG/A). However, operational control and mission responsibility remains vested in the respective heads of each of these organizations. Thus, the instant petition would include in the proposed consolidated unit 3 of the 6 established "bureaus" (FPS, INS and USMS), 3 of the 21 organizations in the OBD (BIA, CRS and the 2 U.S. Attorney Offices, which are but a "fragment" of the 95 U.S. Attorney Offices comprising the Executive Office of U.S. Attorneys (EOUSA)) as well as USPC, an independent agency. Such a unit would encompass approximately 17,000 of the Agency's 56,000 employees. Organizationally, the FPS, INS, USMS, BIA, USPC and EOUSA report on program matters to the Attorney General through the Associate Attorney General and the Deputy Attorney General. The CRS, on the other hand, reports directly through the Deputy Attorney General to the Attorney General. As noted above, USPC was established in 1976 as an "independent agency" within the Agency, and was granted the authority for totally independent personnel and budget functions.4/

The missions differ among the various organizational components of the proposed consolidated unit. For example, the mission of the INS is to administer and enforce immigration and nationality laws; the mission of FPS is to guard Federal prisons and provide rehabilitation for prisoners; the mission of the U.S. Attorney Offices is to represent the Federal Government in civil and criminal actions; and the mission of CRS is to provide assistance in resolving disputes relating to discrimination. As a consequence, the employees in each of the components of the proposed consolidated unit have job qualifications, duties and working conditions which are not related or equivalent to those of employees in other components.5/ For example, employees in the INS are concerned with the police activities of patrolling the nation's borders, finding

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4/ 18 U.S.C. §§ 4201 - 4218 (1976).

5/ In addition, although a few classifications are common to all of the organizational components of the consolidated unit sought, most classifications in each component are unique to and reflect the mission of that component.

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illegal aliens, and resolving conflicts concerning appropriate nationality, while the employees in FPS are involved in guarding and rehabilitating Federal prisoners; the employees of the U.S. Attorney Offices are primarily professionals representing the interests of the Federal government in both criminal and civil matters in various courts of law, while employees of the CRS are basically mediators in disputes concerning civil rights, whose purpose is to avoid litigation. Thus, the employees in the various components have little in common in terms of working conditions, qualifications or duties due to the diverse missions and goals of each of the components.

The record further establishes that there are no personnel or labor relations functions at the Attorney General-Deputy Attorney General level of the Agency. Rather, each of the "bureaus" has been delegated full personnel and labor relations authority, which some exercise at the "bureau" level, and some redelegate to subordinate organizational levels.[6/] Moreover, the USPC Chairman exercises full personnel and budgetary authority as a consequence of statutory authorization,[7/] without the Attorney General being involved in any way.

In Department of Transportation, Washington, D.C., 5 FLRA 646 (1981), the Authority dismissed petitions to consolidate units noting that section 7112(a)(1) of the Statute requires any unit found appropriate to conform to the three criteria established by that section--a clear and identifiable community of interest among the employees in the unit, the promotion of effective dealings with, and the efficiency of the operations of, the agency involved. The Authority further noted that section 7112(d) of the Statute,[8/] which provides for the consolidation of

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6/ For example, final decisions for all personnel and administrative actions are taken at the level of the Director of USMS, and for most of such actions at the level of the AAG/A for all OBDs. On the other hand, the Director of FPS has redelegated this authority to Regional Directors and Wardens, and the Commissioner of INS has redelegated such authority to Regional Directors, and, in some instances, to District Directors.

7/ 18 U.S.C. § 4204(a)(2) (1976).

8/ Section 7112(d) provides as follows:

> (d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

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existing units into a single more comprehensive unit, requires that such consolidated unit meet the same three criteria required of any proposed unit.

In subsequent decisions, the Authority, in making its determinations on the appropriateness of such proposed consolidated units, has considered several factors. Primary among these factors, in determining whether there was a community of interest, were: the degree of commonality and integration of the mission and function of the components involved; the distribution of the employees involved throughout the organizational and geographical components of the agency; the degree of similarity in the occupational undertakings of the employees in the proposed unit; and the locus and scope of personnel and labor relations authority and functions.9/

The Authority finds that the employees in the proposed consolidated unit herein do not share a clear and identifiable community of interest. The record establishes that the proposed consolidated unit encompasses three of the six bureaus, fragments of the OBDs, which are organizationally treated as a "bureau," and an independent agency attached to the Agency for administrative purposes only. Most of the employees in the proposed consolidated unit, representing about 31 percent of the total work force of the Agency, have divergent career interests and working conditions, attributable to the diverse missions of their respective organizational components which are involved in the proposed consolidation. Further, the record shows a minimal amount of interchange of employees among the various organizational entities involved herein, and the majority of job classifications and qualifications, as well as the terms and conditions of employment of the employees encompassed by the proposed consolidated unit, relate to the unique functions of the particular organizations in which they are employed. Finally, the record shows that personnel and labor relations authority and functions have been delegated to the "bureau" level or below, and there does not presently exist any official or group of officials authorized to perform such functions Agency-wide. In addition, in the case of the USPC, such functions are totally independent of the Agency and the Attorney General. Under these circumstances, the Authority finds that the petitioned-for consolidated unit would not ensure a clear and identifiable community of interest among the employees involved.

9/ See, Headquarters, U.S. Army Materiel Development and Readiness Command, 13 FLRA No. 110 (1984); U.S. Army Materiel and Readiness Command, 11 FLRA No. 36 (1983); Department of the Navy, U.S. Marine Corps, 8 FLRA 15 (1982); Air Force Logistics Command, United States Air Force, Wright-Patterson Air Force Base, Ohio, 7 FLRA 210 (1981); Department of Defense, U.S. Army, Corps of Engineers, 5 FLRA 677 (1981); Army and Air Force Exchange Service, Dallas, Texas, 5 FLRA 657 (1981).

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Nor can the Authority conclude that either of the two alternative consolidated units suggested by the AFGE at the hearing is appropriate. The first alternative unit is composed of FPS, INS, USMS, BIA, and CRS, eliminating from the proposed unit the USPC and the two U.S. Attorney Offices; the second alternative unit is composed only of FPS, INS and USMS, eliminating, in addition to USPC and the two U.S. Attorney Offices, the BIA and the CRS. The facts herein would not support a finding of appropriateness with respect to either alternative unit. Thus, in either alternative unit, the employees included would have divergent career interests and conditions of employment directly related to the wide variance in the missions of the organizations employing them. Within either of the alternative units suggested, there is minimal interchange, and the job classifications and qualifications, and the general working conditions of the employees, are distinct and related to the unique functions of the organization in which they are employed. Finally, as noted above, the personnel and labor relations functions of the organizations in either of the alternative units historically have been delegated to each component and, in some instances, redelegated to regional and installation levels. In sum, the only principal factor in support of a finding of community of interest appears to be that all these employees are under the general policy direction of the Attorney General.

Accordingly, the Authority finds that the proposed consolidated unit, and both of the proposed alternative consolidated units, are not appropriate for the purpose of exclusive recognition under the Statute, and will order that the petition be dismissed.10/

10/ Inasmuch as all three criteria of section 7112(a)(1) of the Statute must be satisfied in order for the Authority to find that the proposed consolidated unit is appropriate, and a failure to satisfy any one of them must result in a finding that the unit sought is inappropriate, the Authority's finding that the unit sought herein fails to meet the community of interest criterion makes it unnecessary to address the other two criteria. See Department of the Navy, Aviation Supply Office, 12 FLRA No. 92 (1983).

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ORDER

IT IS ORDERED that the petition in Case No. 3-UC-17 be, and it hereby is, dismissed.

Issued, Washington, D.C. February 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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APPENDIX

UNIT #1 - Federal Prison System (FPS)

Included: All nonsupervisory GS professional and non-professional employees of the Bureau of Prisons and Federal Prison Industries, Inc., Central Office.

Excluded: All supervisors, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, temporary employees on appointments NTE 90 days, confidential employees and guards as defined in Executive Order 11491.

UNIT #2 - FPS

Included: All employees, Class Act, Wage Board, and Professional, of the Bureau of Prisons and Federal Prison Industries, Inc., shall constitute the unit of recognition for exclusive recognition under Executive Order 10988.

Excluded: Any managerial executive, any employee engaged in Federal personnel work in other than a purely clerical capacity, both supervisors who officially evaluate the performance of employees and the employees whom they supervise. All Central Office employees are excluded from the unit of recognition.

UNIT #3 - Immigration and Naturalization Service (INS)

Included: All nonsupervisory and nonprofessional employees in the Immigration and Naturalization Service.

Excluded: All employees assigned to Border Patrol Sectors.

UNIT #4 - INS

Included: All nonprofessional employees assigned to Border Patrol Sectors, Service-wide.

Excluded: All supervisors, professionals, management officials, and employees engaged in Federal personnel work in other than a purely clerical capacity.

UNIT #5 - U.S. Marshals Service

Included: All nonprofessional employees of the U.S. Marshals Service world-wide including intermittent employees and term Deputies.

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Excluded: Professional employees, confidential employees, temporary employees with no reasonable expectation of continuous employment, internal investigators, supervisors, management officials, guards as defined in the Order and Federal personnel workers in other than a purely clerical capacity.

UNIT #6 - Board of Immigration Appeals

Included: All nonsupervisory professional and nonprofessional employees at the Board of Immigration Appeals in Washington, D.C.

Excluded: All part-time students, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, supervisors and guards.

UNIT #7 - Community Relations Service

Included: All nonprofessional employees of the United States Department of Justice, Community Relations Service.

Excluded: All professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

UNIT #8 - Executive Office of U.S. Attorneys (EOUSA)

Included: All nonprofessional (staff support) employees of the United States Attorney for the District of New Jersey.

Excluded: Professional, managerial, supervisory, and confidential employees, guards, and employees engaged in Federal personnel work in other than a purely clerical capacity.

UNIT #9 - EOUSA

Included: All nonprofessional employees of the Office of the U.S. Attorney for the Western District of New York.

Excluded: Professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, supervisors and guards as defined in the Executive Order. Also excluded are the Secretary to the U.S. Attorney, the Secretary to the First Assistant U.S. Attorney, the Administrative Clerk and all employees of the Buffalo Strike Force of the Organized Crime and Racketeering Section.

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UNIT #10 - U.S. Parole Commission (USPC)

Included: All nonprofessional GS employees of the Board of Parole Headquarters except those excluded below.

Excluded: Professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in Executive Order 11491.

UNIT #11 - USPC

Included: All professional GS employees of the Board of Parole Headquarters except those excluded below.

Excluded: Nonprofessional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in Executive Order 11491.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. CUSTOMS SERVICE,
LAREDO, TEXAS

Activity

and

Case No. 0-AR-544

CHAPTER 145, NATIONAL
TREASURY EMPLOYEES UNION

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator A. Dale Allen, Jr. filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter concerns the denial of the requests of two female customs inspectors to exchange shifts with two male customs inspectors. The exchange requests were denied on the basis that the shifts requested to be exchanged would have been left without a female customs inspector on duty to conduct personal searches of female suspects. Grievances were filed and submitted to arbitration claiming that in denying the exchanges the Activity had violated provisions of the parties' collective bargaining agreement.*/

Before the Arbitrator, the Activity argued that there could be no violation of the collective bargaining agreement because the shift exchange provisions pertained only to qualified employees. In this regard the Activity explained that the very nature of the agency mission demands assignment by sex in some instances and that with respect to personal searches, an employee of a specific sex becomes the category of employee which must be ordered and assigned to conduct a personal search depending on the sex of the person waiting to be searched. Thus, the Activity contended that when, as in this case, the employee requesting the shift exchange is the only woman assigned to the shift, only other women are qualified employees for shift exchange

*/ The provisions pertinently provide that subject to approval, qualified employees shall be allowed to exchange shifts and overtime assignments.

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purposes. The Arbitrator agreed with the Activity insofar as personal searches are concerned that sex is a valid basis and qualification for the assignment. However, the Arbitrator rejected the necessity for the assignment of a female inspector to the shifts sought to be exchanged. He indicated that the incidence of personal searches of females is low and that the Activity has other alternatives: use of females from other federal agencies, from local law enforcement agencies, from the deputizing of civilians, and from call-back overtime of a female inspector. Accordingly, as his award the Arbitrator sustained the grievances and directed that as long as present conditions prevail, the type of shift exchanges involved in this case are to be granted.

As one of its exceptions, the Agency contends that the award is contrary to management's right to assign work under section 7106(a)(2)(B) of the Statute. The Authority agrees.

The Authority has repeatedly recognized that the plain language of section 7106 provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. E.g., Professional Air Traffic Controllers Organization and Federal Aviation Administration, 5 FLRA 763, 767 (1981). Therefore, the Authority has consistently held that no arbitration award may interpret or enforce a provision of a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under that section, id., or so as to result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights, e.g., American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 6 FLRA 314, 321 (1981). Section 7106(a)(2)(B) of the Statute, in particular, reserves to management officials the authority to assign work. Encompassed within that authority is the discretion to establish the particular qualifications needed to perform the work assignment to be done and to exercise judgment in determining whether a particular employee meets those qualifications. Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California, 9 FLRA 703, 706 (1982). In terms of this case, as already noted, the Activity denied the disputed shift exchanges because it determined that the employees who were to exchange with the grievants were not qualified. Thus, the Arbitrator has negated the exercise by management of its right to establish qualifications and to determine whether particular employees meet those qualifications when the Arbitrator, as the award, sustained the grievances and directed that as long as present conditions prevail, the type of shift exchanges involved in this case are to be granted. In so directing, the Arbitrator has substituted his judgment for that of the Activity as to which employees are qualified for a particular work assignment and compels the Activity to treat male and female customs inspectors as functional equivalents when the Activity has determined otherwise in order that the work assignment of personal searches may be accomplished regardless of the sex of the suspect.

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Consequently, the Authority finds that the award interferes with management's right to assign work and is therefore contrary to section 7106(a)(2)(B). See Veterans Administration Hospital, Lebanon, Pennsylvania and American Federation of Government Employees, AFL-CIO, Local 1966, 11 FLRA No. 43 (1983).

Accordingly, the award is set aside.

Issued, Washington, D.C., February 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEFENSE MAPPING AGENCY AEROSPACE CENTER
ST. LOUIS, MISSOURI

Respondent

and

Case No. 57-CA-20231

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1827

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and a supporting brief, and the Respondent filed an opposition.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and Recommended Order.

ORDER

IT IS ORDERED that the complaint in Case No. 57-CA-20231 be, and it hereby is, dismissed.

Issued, Washington, D.C., February 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE DEFENSE MAPPING AGENCY AEROSPACE CENTER ST. LOUIS, MISSOURI Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1827, (Independent) Charging Party	Case No. 57-CA-20231

Mr. Louis P. Eaves
For the Respondent

Mr. Louis Foster
For the Charging Party

Sandra LeBold, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued on behalf of the General Counsel, Federal Labor Relations Authority, against the Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri (Respondent). The complaint alleged, in substance, that Respondent violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by issuing an official reprimand to employee Linda Reis because of

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statements she made during the course of a grievance meeting on January 12, 1982. Respondent's answer denied that the reprimand violated the Statute.

A hearing was held in this matter in St. Louis, Missouri. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witness, and file post-hearing briefs. Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits, other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material herein, the National Federation of Federal Employees, Local 1827 (Charging Party or Union) has been recognized as the exclusive representative of an appropriate unit of Respondent's employees.

On January 11, 1982 Linda Reis, a journeyman photographer in the Precision Photography Lab, was issued a letter of caution for use of abusive language. The letter provided, in part, as follows:

> . . . I have determined to issue you a letter of caution for your abusive language. The reason for this letter is as follows:
>
> As reported to me by your supervisor, George Huelsman, specifically, on the morning of 7 January 1982, when he assigned you to the task of cleaning the crossover racks on the Versamat Processor, you replied, "Get Screwed" and you did not in the ensuing conversation indicate you were not serious but in fact you became more arrogant when he suggested that you should watch what you say to people and you replied, "I don't need to worry, I'm leaving anyway." In view of the attitude you displayed, he immediately decided to assign you another task and to pursue the issue in this manner.
>
> This letter is issued to you in order to provide you with an opportunity to change your behavior, and to bring to your attention that continued behavior along these lines could result in formal disciplinary action being taken against you.

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> . . . [T]his letter will not be recorded in your Official Personnel Folder, but will be retained in my files for a period of one year from the date of issuance.1/

After receiving the letter, Ms. Reis immediately contacced Union steward Vincent Love. Mr. Love requested that an informal grievance meeting be held to discuss the letter of caution. Such a discussion between the affected employee, the area steward, and the first level supervisor constituted step one of the negotiated grievance procedure.

The meeting was held the next day, January 12, 1982, in a private conference room. The meeting was attended by Ms. Reis, Union steward Love, General Foreman Robert Willett, and George Huelsman. Mr. Huelsman had been Ms. Reis' acting supervisor from November 27, 1981 to January 9, 1982, but was no longer a supervisor as of the time of this meeting. However, as urged by Respondent, I find that he was a management official, or at least a representative of management, for purposes of this meeting. At the time of the meeting, Ms. Reis had also been transferred to a different section and was under different supervision.

Foreman Willett asked the purpose of the meeting. Union steward Love brought up several alleged procedural problems with the letter of caution and contended that the letter was too severe considering the language

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1/ There was considerable testimony concerning the circumstances leading up to the letter of caution. It is unnecessary for purposes of this case to make additional detailed findings in this regard, and it is noted that the letter of caution is the subject of an equal employment opportunity (EEO) complaint. However, the testimony concerning the letter of caution was considered in evaluating the overall credibility of the witnesses. Based on the entire record, I credit the background testimony of Respondent's witnesses, Messrs. Huelsman and Willett, concerning this event. Their testimony supports the statements in the letter.

I also reject Ms. Reis' testimony that when Mr. Willett gave her the letter of caution he tried to coerce her into not pressing the issue further.

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used in the lab.2/ Ms. Reis and Mr. Huelsman then gave their versions of what had been said on the day in question. There was a dispute between the two over the sequence of events. Ms. Reis contended that she had not said she was leaving anyway. Ms. Reis also contended that she had made the statement in jest and would accept the letter of caution if it stated that she was only kidding when she made it. Ms. Reis asked Mr. Huelsman whether he had also been kidding when he told her to clean the processors. Mr. Huelsman hesitated answering, and Mr. Love said that he did not have to answer the question. Mr. Willett at some point told Ms. Reis that she disrupted production because the men stopped to talk to her because of her popularity. Ms. Reis took the comment as a reflection on her morals. At some point, Ms. Reis expressed her frustration, stating, in part, "There's a lot of foul language that goes on in that lab . . . I [have] always taken it as part of the working environment and the subtle propositions. . . . I tried being nice to everybody in the lab. I walk on thin ice around here and you get screwed."

There was further conversation back and forth concerning what had been said on January 7. Ms. Reis tone of voice became louder and louder. Finally, Ms. Reis, pointing her finger at Mr. Huelsman, stated in a loud voice, "I said it before and I'll say it again, George. Get Screwed!" This occurred toward the end of the meeting, and the meeting ended shortly thereafter.3/

On January 20, 1982, Mr. Willett issued his decision on the first step grievance. He denied the grievance, stating in part:

2/ Abusive, vulgar, and profane language is commonplace in the lab. It is used by both employees and supervisors in both friendly and unfriendly contexts, such as a disagreement over how a job should be performed. However, it is neither usual or acceptable for an employee to tell a supervisor to "get screwed," particularly in the context of refusing an assignment.

3/ Ms. Reis emphatically denied telling Mr. Huelsman to "get screwed" this second time. She testified that her only comment had been, as reflected above, to the effect that she was doing the best she could and was "getting screwed." Steward Love supported Ms. Reis' testimony to a degree, despite his vague recollection, but acknowledged that Ms. Reis was pointing at Huelsman at the time of her statement. In making the findings as to what occurred at the meeting, I have credited the contrary testimony of Messrs. Willett and Huelsman in this respect.

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You admitted to having made the abusive statement to Mr. Huelsman, however, you contended that it was made in jest. I advised you that your attitude at the time of the incident indicated that you were serious when you made the statement. In fact, the attitude you displayed at the grievance discussion further confirmed my conclusion.

On January 21, 1982, Mr. Willett issued Ms. Reis a written letter of reprimand. The letter stated, in part:

2. This is an official reprimand for disrespectful conduct toward and use of abusive language to a management official. Specifically:

a. On 12 January 1982, I met with you, Mr. Vincent Love, your Union representative and Mr. George Huelsman, the former acting foreman of SDRCA, to discuss your complaint regarding the Letter of Caution issued to you 11 January 1982. During this meeting, you stated you were "kidding" when you made the statement "Get screwed" to Mr. Huelsman on 7 January 1982. However, before the meeting ended, you pointed your finger directly at Mr. Huelsman, who at that time was acting in a management capacity, and said, "I did. I admit I said it before and I'll say it to you again George. Get screwed." Your conduct at this point left no doubt in my mind as to the disrespectful and abusive intent of your statement toward Mr. Huelsman. In fact, I personally found your conduct to be disruptive, insulting and unwarranted.

b. Further, it is your responsibility as an employee to discharge your assigned duties conscientiously and to respect the administrative authority of those directing your work. In my judgement, you have not met these responsibilities and, in order to correct your behavior and maintain discipline and morale among other employees, this action is taken.

3. In deciding to issue this letter of reprimand, I have considered that an 11 January 1982, you were given a letter of caution for use of abusive language to your supervisor.

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> 4. Based on the above stated reasons and in accordance with the provisions of [Defense Mapping Agency Instruction 1429.2, Civilian Employee Discipline] you are hereby issued a letter of reprimand for disrespectful conduct toward and use of abusive language to a management official. An official reckoning period of two (2) years from the date of this letter is established. This letter will remain in your Official Personnel Folder for two (2) years, and should you commit another offense during this period, a more severe penalty may be imposed. (Jt. Exh. 5).

On January 27, 1982, Ms. Reis contacted an EEO Counselor to initiate an informal complaint of discrimination. She alleged that both the letter of caution and the letter of reprimand were issued to her because she is a female. (Tr. 111; General Counsel's Exh. 1w, attachment 2).

On January 29, 1982, Ms. Reis referred her grievance to the second step pursuant to the negotiated agreement. She stated, "I am grieving the letter of caution dated 7 January [sic] and letter of reprimand for disrespectful conduct dated 21 January 1982 from Mr. Robert W. Willett. The letters presented to me are untrue and were in violation of Article 26, Section 1 and Section 2 of the Negotiated Agreement." By letter dated February 5, 1982, Respondent informed Ms. Reis that her attempt to raise the letter of reprimand at the second step was denied as untimely. Respondent stated that this grievance had not been raised at the first step within five days as required by the negotiated grievance procedure. Respondent also noted that, had the grievance as to the letter of reprimand been timely, it would be denied on the ground that she had raised the same issue in an EEO complaint.

By letter dated February 8, 1982, Respondent denied the second step grievance concerning the letter of caution. On March 8, 1982, the EEO Counselor submitted his final report concerning the informal EEO complaint. The Counselor's investigation and recommendation encompassed both the letter of caution and the letter of reprimand. On March 18, 1982, Ms. Reis filed a formal complaint of discrimination. She alleged that Mr. Willett "discriminated against me by requiring a higher/different standard of conduct/behavior than those required of males." She listed the date of the letter of caution, January 11, 1982, under "the most recent date on which discrimination has taken place." Her narrative concerning the alleged discrimination dealt primarily with the circumstances surrounding the letter of caution; however she did note, "At a meeting regarding the letter of caution I was given a reprimand for saying I felt I was getting screwed."

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On March 15, 1982, the Charging Party filed its charge with the Authority. It alleged that Respondent had issued the January 21, 1982 letter of reprimand to Ms. Reis for conduct while engaged in protected activity and to discourage Ms. Reis from filing grievances and exercising her rights under the Statute.

Discussions and Conclusions

Motion to Dismiss Under Section 7116(d)

Respondent has moved to dismiss the complaint under section 7116(d)[4/] of the Statute on the grounds that the same issue, the letter of reprimand, has been raised under a negotiated grievance procedure and as an EEO complaint under an appeals procedure. Respondent asserts that, in such circumstances, further proceedings under the Statute are barred. This burden is on Respondent to establish the applicability of section 7116(d). Social Security Administration, Office of Program Operations and Field Operations, Sutter District Office, San Francisco, California, 5 FLRA No. 63 (1981).

With respect to whether the same issue has been raised in a grievance, the record reflects that Ms. Reis did attempt to raise the merits of the January 21, 1982 letter of reprimand when she submitted her grievance concerning the January 11, 1982 letter of caution to the second step. At this time, she contended that both letters were untrue and violated the negotiated agreement. Respondent rejected Ms. Reis' attempt to grieve the letter of reprimand as untimely. It has not been timely raised at a first step as required by the negotiated grievance procedure. The original grievance filed on January 12, 1982 clearly predated the January 21, 1982 letter of reprimand. Thus, it could not be considered part of the original grievance. See Federal Election Commission, 6 FLRA No. 59 (1981). Even if the letter of reprimand were deemed to have been

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4/ Section 7116(d) of the Statute provides:

> (d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

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raised in the grievance proceeding, it is noted that the employee's grievance as to the letter of caution and her attempt to raise the letter of reprimand therein attacked the merits of the letters, i.e., that the allegations therein were untrue. There was no allegation that the letters interfered with her rights under the Statute, as was alleged by the Union in its unfair labor practice charge with respect to the letter of reprimand. Therefore, the issues being raised by the aggrieved parties in the separate forums are different and the instant complaint is not barred by section 7116(d) of the Statute because of the employee's grievance. Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, 10 FLRA 88 (1982).

With respect to the EEO complaint, Respondent has not proved that the issue raised as the unfair labor practice "can properly be raised" under that appeals procedure. It appears that the issues in the EEO proceeding will necessarily be limited to the sex discrimination issue raised by Ms. Reis. Cf. Department of Agriculture, U.S. Forest Service, Siuslaw National Forest, Corvallis, Oregon, 3 FLRA 272 (1980); Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, 2 FLRA 115 (1979); Veterans Administration, Veterans Benefits Office, 3 A/SLMR 444 (1973). Moreover, Ms. Reis' formal EEO complaint deals primarily with the letter of caution and only tangentially refers to the letter of reprimand flowing from the grievance meeting. Cf. Federal Election Commission, supra.

In my view, Respondent has failed to establish section 7116(d) as an affirmative defense, and the motion to dismiss is denied.

The Letter of Reprimand Did Not Violate Section 7116(a)(1)

The issue for determination is whether Respondent, by reprimanding Ms. Reis for disrespectful conduct toward and use of abusive language to a management official (that is, pointing her finger and stating, "I said it before and I'll say it again, George. Get screwed!") during the course of a grievance meeting violated section 7116(a)(1) of the Statute,5/ by interfering with, restraining, or coercing the employee in the exercise of any right under the Statute.

5/ Section 7116(a)(1) provides:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter[.]

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Ms. Reis' participation in the presentation of her grievance was a right protected by the Statute. Her right to participate in the discussion of the grievance was also incorporated into the parties' negotiated grievance procedure. The Authority, in Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA 54 (1979), has adopted the following standard for determining whether an employee may be disciplined for intemperate language and conduct occurring during the course of protected activity:

> In the Authority's view flagrant misconduct by an employee, even though occurring during the course of protected activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity is beyond the ambit of protected activity. The employee's right to engage in protected activity permits leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect for its supervisory staff on the jobsite.

A similar standard governs the private sector. See NLRB v. Thor Power Company, 148 NLRB 1379, enf. granted 351 F.2d 584 (7th Cir., 1965). As the Court stated in United States Postal Service v. NLRB, 652 F.2d 409 (5th Cir., 1981), at p. 411:

> This conflict typically arises in cases where an employee has been disciplined for conduct that occurred during the course of the grievance meeting. See, e.g., NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 671-73 (5th Cir. 1978) (employee called administrator "a Mafia director"); Crown Central Petroleum Corp. v. NLRB, [430 F.2d 724 (5th Cir. 1970)] (employee accused a superintendent of lying). The Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance is necessary if grievance meetings are to succeed at all; as we have noted before, "bruised sensibilities may be the price exacted for industrial peace." Crown Central Petroleum Corp v. NLRB, supra, at 731. See Bettcher Manufacturing Corp., 76 N.L.R.B. 526 (1948). In some cases, however, the employee's conduct during the meeting has been found to be so opprobrious or

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> disruptive that the Act's protection must give way to the employer's right to maintain discipline in its establishment. When the employee's conduct during a grievance meeting is "indefensible under the circumstances," the employer may indeed discipline the employee without violating the Act. NLRB v. Florida Medical Center, Inc. supra, at 673.

The question is whether Ms. Reis' remarks were within the ambit of protected activity, allowing leeway for impulsive behavior, or were so opprobrious and insubordinate as to be indefensible under the circumstances, thus constituting flagrant misconduct, appreciably impinging upon the employer's right to maintain order and respect for its supervisory staff and justifying discipline as outside the protection of the Statute.

The various factors to be considered in striking the balance should include (1) the place and subject matter of the discussion, (2) whether the employee's outburst was impulsive or designed, (3) whether the outburst was in anyway provoked by the employer's conduct, and (4) the nature of the intemperate language and conduct. Cf. Atlanta Steel Co., 102 LRRM 1247 (NLRB, 1979). The balance must be struck in each case with an eye to the special facts presented by it.

The place of the discussion weighs heavily in Ms. Reis' favor. The remarks were made during the course of a closed grievance meeting and not as a calculated flagrant act of insubordination in front of other employees. See Boaz Spinning Co., v. NLRB, 395 F.2d 512, 68 LRRM 2393 (5th Cir. 1968) (employee firing upheld for interrupting a manager's anti-union presentation in front of all employees and calling him, in part, "no different than Castro"). The location and circumstances of the meeting made it a sanctuary where it could reasonably be expected that a full, free and frank exchange of views would be fully aired among equals - advocates of their respective positions. See Crown Central Petroleum Corp., v. NLRB, 430 F.2d 724 (5th Cir. 1970). A grievance procedure is a conflict resolution mechanism. Passions run high and conflicts are highly emotional and personal. The Authority has recognized that there must be leeway for impulsive behavior in such circumstances.

Ms. Reis' conduct was impulsive rather than designed. Her remarks came during the end of a grievance meeting. It is reasonable to conclude that Ms. Reis, realizing that her version of the first "get screwed" remark was not being accepted, simply decided to abandon all efforts at rational persuasion and reiterate to her former supervisor that he could "get screwed."

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While Ms. Reis' remarks may have been actuated or swayed by emotional impulses, the impulses were deliberate and not involuntary. Ms. Reis was not impelled or incited to make the statement by provocative conduct on the part of Respondent's representatives.6/ Her remarks were not pertinent to a discussion of the grievance under consideration.7/ The remarks consisted of a repetition of the very behavior she had been cautioned against, although this time it was not made on the shop floor.

In striking a fair balance between the statutory right of the employee to engage in protected activity with leeway for impulsive behavior, on the one hand, and the employer's right to maintain order and respect for its supervisory staff on the other, the scale here tips rather heavily in favor of the employer. In my view, Ms. Reis' remarks

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6/ The record supports Ms. Reis' testimony that she was provoked to state earlier during the meeting that she was "getting screwed." However, she was not reprimanded for this statement, and I find no provocation or mitigating circumstances for her second statement.

7/ Compare Department of Housing and Urban Development, San Francisco Area Office, San Francisco, California, 4 FLRA No. 64 (1980) (steward's referring to supervisor as "racist, sexist, and ageist" were related to grievant's discrimination allegations, and statement, "I'm not going to give you shit," related to supervisor's unreasonable demand for a letter acknowledging responsibility); Veterans Administration Regional Office, Denver, Colorado, 2 FLRA 667 (1980) (union president's description of personnel officer's actions in a grievance as "malevalent" and the officer as "incompetent" held to be traditional collective bargaining language); Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA 53 (1979) (steward shook his fist in supervisor's face and said, in part, "I am going to get your ass. I filed an unfair labor practice and if the Council doesn't get your job, then something is wrong." Remarks held to be related to foreman's pervasive course of conduct in interfering with protected rights); Department of the Army, Headquarters, Military Traffic Command, 2 FLRA 539 (1980) (statements by Union member of rating panel that loudly accused management members of being "indoctrinated by management," "rating unfairly," and being "told how to rate" held to represent legitimate concern of the Union representative); Department of the Air Force, Scott Air Force Base, Illinois, Case No. 5-CA-1129, 13 ALJDR (1982) (Employee at grievance meeting made impulsive comments by repeatedly called third-level supervisor "a Hitler" because of her frustration over the procedures being used by the supervisor to run the meeting which prevented her from telling her story.)

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were indefensible under the circumstances and constituted flagrant misconduct, thus justifying discipline as outside the protection of the Statute. Just as employees and their representatives may not have their rights undermined by being unduly constrained by fear of personal repercussions if they fail to remain within the strict bounds of propriety in the presentation of grievances, neither may they act with impunity while engaged in such protected activity. There is a difference between "letting off steam" spontaneously because of frustration, zealousness, or provocation and deliberate, excessive abuse of supervisory staff based on personal antagonism. In my view, this case falls within the latter category. The reprimand for such unusual conduct would not tend to interfere with, restrain, or coerce any employee in the filing or presentation of a grievance.

It is concluded that Respondent did not violate section 7116(a)(1) of the Statute, as alleged. Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

It is hereby Ordered that the Complaint in Case No. 57-CA-20231 be, and it hereby is, DISMISSED.

GARVIN LEE OLIVER
Administrative Law Judge

Dated: January 13, 1983
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF ARMY,
HEADQUARTERS, AND DARCOM HQ

Respondent

and

Case No. 3-CA-30280

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476 (INDEPENDENT)

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts, accompanying exhibits, and the parties' contentions,[1/] the Authority finds:

The complaint alleges that Respondent U.S. Army Materiel Development Readiness Command (DARCOM) Headquarters violated section 7116(a)(1), (5) and (6) of the Statute[2/] by rejecting as nonnegotiable a provision

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1/ Subsequent to the filing of briefs by the parties, Respondent DARCOM Headquarters filed a reply to the brief filed by the Charging Party, National Federation of Federal Employees, Local 476 (Independent) (NFFE), which opposed the consideration thereof. As section 2429.1 of the Authority's Rules and Regulations does not provide for the filing of a reply brief, and the Authority did not grant permission to file a reply brief under section 2429.26 of its Rules and Regulations, such submission has not been considered herein.

2/ Section 7116(a)(1), (5) and (6) of the Statute provides:

§ 7116. Unfair labor practices

(Continued)

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of a collective bargaining agreement between NFFE and U.S. Army Electronics Research and Development Command, Ft. Monmouth, New Jersey (ERADCOM), a subordinate element within DARCOM, which was imposed on the parties by decision of the Federal Service Impasses Panel (Panel),[3/] in violation of the provisions of section 7119(c)(5)(C) of the Statute.[4/]

The stipulated record indicates that NFFE is the exclusive representative of a unit of ERADCOM's employees. During the course of negotiations, a dispute arose involving several proposals concerning the performance appraisal system for employees in the exclusively represented unit. Thereafter, the Panel issued its above-referenced Decision and Order resolving this dispute, wherein it ordered the parties, inter alia, to adopt NFFE's proposal that an employee against whom an action is imposed based on unacceptable performance should receive 60 days advance written notice of the proposed action. Thereafter, on December 14, 1982, ERADCOM and NFFE inserted this provision, among others, into their collective bargaining agreement pursuant to the Decision and Order of the Panel.

2/ (Continued)

(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency --

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate with impasse procedures and impasse decisions as required by this chapter[.]

3/ Department of the Army, U.S. Army Electronics Research and Development Command, Fort Monmouth, New Jersey and Local 476, National Federation of Federal Employees, Case No. 82 FSIP 78 (1982).

4/ Paragraph 9 of the complaint refers to section 7119(b)(5)(C) of the Statute. This inadvertent error is hereby corrected. Section 7119(c)(5)(C) of the Statute provides:

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(c)(5)(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

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By letter dated January 13, 1983, the Chief of DARCOM's Civilian Personnel Division, Directorate for Personnel, Training and Force Development, reviewed the provisions of the collective bargaining agreement pursuant to section 7114(c) of the Statute,[5/] and rejected as nonnegotiable the provision for 60-day advance notice of a proposed performance-based action because that provision was not in accordance with certain applicable law and Department of the Army Regulations.

The parties agreed to present the following legal issue for resolution by the Authority:

> Whether an agency is preempted from exercising its statutory obligation under Section 7114(c) of the Statute when a subordinate activity is under a Federal Service Impasses Panel Decision and Order under section 7119(c)(5)(C) of the Statute regarding incorporation of a provision in a collective bargaining agreement.

The Authority has concluded that section 7114(c) of the Statute authorizes an agency head to review provisions of a collective bargaining agreement imposed on the parties by the Panel and to disapprove provisions which are not in accordance with the Statute and other applicable law, rule or regulation. Interpretation and Guidance, 15 FLRA No. 120 (1984). Thus, an agency head does not violate section 7116(a)(1), (5) and (6) of the Statute by the mere act of reviewing provisions imposed by the Panel. The Authority further concluded in the above-cited Interpretation and Guidance that an agency head's determination to disapprove a

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5/ Section 7114(c) provides in pertinent part:

§ 7114. Representation rights and duties

. . . . . .

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation[.]

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provision imposed by the Panel is subject to review in an unfair labor practice proceeding; therefore, if the Authority finds the provision not to be contrary to the Statute or other applicable law, rule or regulation, such disapproval would constitute a failure or refusal "to cooperate in . . . impasse decisions" in violation of section 7116(a)(1) and (6) of the Statute. However, in the instant case, the General Counsel failed to allege or establish that the provision which the agency head here refused to approve was not contrary to the Statute, or any other applicable law, rule or regulation. Instead, the case is before the Authority on the stipulated issue noted above. The Authority decides the stipulated issue in the negative, and the complaint must be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-30280 be, and it hereby is, dismissed.

Issued, Washington, D.C., February 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

Case No. 3-CA-20604

NATIONAL LABOR RELATIONS BOARD UNION
AND ITS WASHINGTON, D.C. LOCAL

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Exceptions to the Judge's Decision were filed by the Respondent and the General Counsel with supporting briefs.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

In this case, near the end of an employee's first year of employment (about the middle of 1981), the employee's first-line and second-line supervisors determined that the employee's job performance was unsatisfactory. They decided to advise the employee of the problem and to try to assist the employee to improve. The employee and a representative of the National Labor Relations Board Union and its Washington, D.C. Local (the Union) were informed. Numerous conferences and meetings were held with the employee and a Union representative to discuss the problem. Disputes developed concerning the nature of the employee's deficiencies

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and what management should do to assist the employee. Over a period of months, the Union representative insisted that the supervisors should provide the employee with a more specific and detailed description of his deficiencies. The supervisors sought a transfer for the employee to an assignment which they considered more suitable to his skills and abilities.

By April 1982 the supervisors had concluded that the employee had not demonstrated discernible improvement and that something more formal had to be done. They would provide the employee with a detailed description of his deficiencies based on the critical elements of his position. He would be provided with a specified period of time to show improvement. Owing to conflicts which had developed between the employee and the first-line supervisor, the employee would be given on-the-job training by the second-line supervisor. If the employee did not improve during this training and evaluation period, an adverse action would be contemplated.

The employee was provided with the plan by memorandum on or about May 27, 1982, which stated that the plan would be implemented on or about June 15, but that the employee should consult with the Union and come forward with any comments or suggestions. The employee immediately went to the Union. A meeting was set up for very late May or very early June to discuss the matter. At the meeting the Union objected to the plan, asserting that the Respondent had created a new type of improvement plan for this employee as compared to prior plans and that, accordingly, the Respondent had changed a condition of employment without providing the Union advance notice and an opportunity to bargain. The Union also asserted that the matter of "Performance Improvement Plans" was currently under negotiation in the parties' master contract negotiations and that the Respondent could not implement such a plan for this employee while these continued. The Respondent's officials offered to negotiate. The Union refused to negotiate, asserting that an unfair labor practice had been committed and declared that it would file a charge. The Union filed its charge on June 7, 1982. The plan for the employee was implemented, as proposed, on June 16. The employee continued in the Respondent's employ. If anything resulted from implementation of the plan for him, positive or negative, it is not contained in the record.

The Judge found that the Respondent had changed a condition of employment. He found that the Respondent had provided performance improvement plans to employees in the past, but this was the first time detailed references to the "critical elements" of an employee's position had been used to describe an employee's deficiencies. In this regard, it is the Authority's view that insofar as the Respondent had provided employees with such performance improvement plans in the past which did describe the employee's job requirements and deficiencies in performing them, the mere reference to "critical elements" in describing the

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employee's job requirements and deficiencies herein did not constitute a change in that past practice.*/ It is also noted that the supervisors had dealt with the Union on this problem for a number of months and the Union had repeatedly urged the supervisors to be more specific and detailed in describing the employee's deficiencies. In these circumstances, where the supervisors attempted to be responsive to these requests, the Authority concludes that the Respondent did not violate section 7116(a)(1) and (5) of the Statute as alleged in the complaint. Accordingly, the Authority shall order that the complaint be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-20604 be, and it hereby is, dismissed.

Issued, Washington, D.C., February 28, 1985.

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ See United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois, 13 FLRA 636 (1984), wherein the Authority found that rubber stamping of daily reports with "smiley faces" or "frowns," rather than written descriptions such as "good work" or "busy day," did not constitute a change in working conditions. Compare Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA 390 (1984), wherein the Authority adopted the Judge's finding that the unilateral promulgation and implementation of performance standards, where none had been previously established, without affording the employees' exclusive representative prior notice and an opportunity to negotiate concerning the impact and implementation of those standards, violated the Statute.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NATIONAL LABOR RELATIONS BOARD Respondent	
and	Case No. 3-CA-20604
NATIONAL LABOR RELATIONS BOARD AND ITS WASHINGTON D.C. LOCAL Charging Party	

Sharon Prost, Esq.
For the General Counsel

Raymond Forster, Esq.
For the Respondent

Mr. Stephen Lueke
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on August 31, 1982 by the Regional Director for the Federal Labor Relations Authority, Region III, a hearing was held before the undersigned on November 15, 1982.

This case arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based upon a charge filed on June 7, 1982 by National Labor Relations Board Union and Its Washington Local (herein called the Union), against the National Labor Relations Board (herein called the Board or Respondent).

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The Complaint alleged, in substance that on or about May 27, 1982 Respondent informed a bargaining unit employee that he would be operating and would be evaluated under a thirty (30) day performance improvement plan beginning no later than June 15, 1982 and that on June 16, 1982, Respondent implemented the above-mentioned plan without notice or negotiation with the Union although the matter of such performance improvement plan was a subject of negotiations then being conducted.1/

Respondent filed an answer dated September 27, 1982 which denied the material allegations in the Complaint as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded an opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence addressed at the hearing, I make the following findings and conclusions:

Findings of Fact

The Board and the Union were parties to a collective bargaining agreement covering clerical employees in the Board's Washington, D.C. headquarters unit, at all times material herein. The most recent collective bargaining agreement contains articles concerning a grievance procedure, training, promotions, adverse actions and other subjects, as well as language specifying that the agreement be read in accordance with applicable law. This latest agreement also provided for periodic appraisal of employees.

A. The Performance Improvement Plan was Subject of Negotiations During Summer 1982.

The material agreement herein was executed on April 1, 1980 and continued in effect at least through the summer of 1982, by mutual agreement of the parties despite its expiration date of December 31, 1981.

Negotiations for a new agreement commenced during the summer of 1981, but recessed sometime around September 1981, without any agreement having

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1/ The charge herein dated June 7, 1982 makes no mention of the June 16, 1982 implementation. However, the General Counsel premises a major portion of the violation in this matter and, indeed requests a remedy which would set aside that implementation.

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been reached, resumed in May 1982, and thereafter continued through the summer of 1982.

Since performance improvement plans (PIP's) were not a part of the existing agreement the parties negotiated concerning performance appraisals with an aim toward modifying the existing contract. Such modification included tailoring the contract to the then new Civil Service law of 1978 and including a new performance appraisal system. When negotiations resumed in May 1982, the parties made performance appraisal negotiations part of the overall negotiations for the new agreement. The performance appraisal negotiations beginning in 1981 involved the exchange of proposals by the parties which included a PIP. The PIP proposals which were exchanged not only identified the PIP, but defined it, established procedures and time frames for its use and detailed the circumstances in which it was necessary or required.

The Board's proposals with regard to the PIP which were received by the Union on May 26, 1982, and is closest to the event which triggered the unfair labor practice charge herein under Section 1(k)(1), read as follows:

> 'Performance Improvement Plan' means the plan formulated to provide an employee with an identification of the critical elements in which the employee's performance falls below the required level and the required improvements and results in performance necessary to avoid the denial of a within grade step increase or the taking of a performance-based adverse action (a reduction in grade or a removal). Such plan will include the identification of the assistance which will be provided to the employee to correct his/her performance so as to avoid the action specified. Prior to the completion of a written Performance Improvement Plan, the affected employee will be afforded an opportunity to submit suggestions with respect to the assistance to be provided.

The Union's June 29, 1982 counter-proposal modified somewhat the language of the first sentence substituting the following:

> the taking of a performance-based adverse action or the denial of a noncompetitive promotion.

Similar language was adopted by the Board in its July 8, 1982 proposals.

In any event, it was clearly established on the record that the parties were involved in negotiations concerning the PIP during the summer of 1982, at least as early as May and that those negotiations continued during the period in question herein.

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B. Past Practice Under Agreement

Prior to promulgation of the Civil Service Reform Act of 1978, the Board used several methods to evaluate employee performance and to assist employees, where the need was present, in improving their performance. Clearly, performance improvement plans, as anticipated by the parties in the 1981-82 negotiations, which would bring the Board's performance appraisal system in line with Civil Service Reform Act of 1978 requirements by utilizing critical elements and performance standards were not used by the Board prior to May 1982.

As shown by the evidence, numerous methods were employed by the Board to reprimand or warn employees that adverse action was anticipated based on unsatisfactory work performance or leave abuse. The evidence indicates that these Board actions were taken in conformity with then existing Civil Service requirements and the Board's 1970 Administrative Manual, section 2068.1. Although most employees were informed of the areas in which they were deficient, were informed what was expected to bring their performance to an acceptable level and were given specific time periods to improve whatever performance was unacceptable, not until May 1982, did any such Board actions mention critical elements of a specific job since no such elements for appraisal were used prior to that time.

C. The Performance Improvement Plan Issued To Barbano

The instant dispute was occasioned by an alleged PIP given to employee Edward F. Barbano on May 27, 1982 and implemented on June 16, 1982. As already noted the parties during this same period were engaged in bargaining concerning the PIP to be contained in the newest collective bargaining agreement. The Union upon being informed of Barbano's plan raised objection to its implementation on June 7, 1982.

There is no dispute that employee Barbano, had performed unsatisfactorily in the position of Public Affairs Specialist over a protracted period of time and that several meetings between Barbano, his supervisors and the Union had been held, specifically to discuss Barbano's work situation and the possibilities for his improvement. There is also no dispute that the Board, without input from the Union prepared a plan to assist Barbano in improving his work performance and that this plan was based on Barbano's not performing at least one of the critical elements of his position "i.e. summarizing NLRB decisions and orders" and that it prepared a plan providing 30 working days for Barbano to improve his performance. Further, there is no dispute that on June 16, 1982, the Board granted Barbano a 70-day period in which to bring his work performance to an acceptable level "simultaneously with the beginning of the 30 working day training period recently developed for you," and that the 70-day notice was premised entirely on the critical elements of his job.

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While it is contended that the Union had previously advocated some sort of assistance for Barbano, the record is clear that it was not aware that a PIP similar to the plan being discussed in negotiations, had been prepared for Barbano until after Barbano received the May 27 memorandum from the Director of Information, Thomas W. Miller, Jr., advising him of the plan and providing "a 30 working day period in which to improve your performance."

As already stated, the evidence reveals that in similar situations the Board had issued memoranda and guidance to employees concerning work related problems and performance. These memoranda, however, were for the most part, issued prior to the new Civil Service Reform Act of 1978 and contained no formal performance improvement plan involving critical elements such as the plan received by Barbano. The explanation why such criteria was missing is obvious, since critical elements and performance standards were an entirely new concept not considered by the parties or included in previous collective bargaining agreement.2/

Discussion and Conclusions

The General Counsel's position is simply that the May 27, 1982 memorandum to Barbano was a performance improvement plan; that this plan was a change in previous practice at the Board with respect to bargaining unit employees; and, that its unilateral implementation without proper notice to the collective bargaining representation while the matter was a subject of negotiations between the parties constitutes a violation of section 7116(a)(1) and (5) of the Statute.

Normally, a unilateral change by an employer during the course of negotiations would be regarded as a per se violation. The Board, however, asserts that a question arises as to whether the training program given Barbano was indeed a performance improvement plan within the meaning of the collective bargaining agreement then being negotiated; and whether it instituted a new term of condition of employment or practice without giving proper notice to the Union.

The Board claims that the plan given Barbano was not a performance improvement plan because it was not so labled and there are no existing PIP's with which it might be compared. However, the Board, admits and the evidence clearly disclosed that the plan issued to Barbano comes within the definition of such a plan as anticipated by the parties during negotiations. In such circumstances, comparison with other plans is not the only criterion for consideration. Instead the question is whether or not the memoranda given Barbano involved matters which were then under negotiation between the parties. The instant record reveals that the

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2/ The General Counsel's unopposed Motion to Correct Transcript is gra ed.

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plan Barbano received matches what the parties had by definition anticipated a PIP to contain. Furthermore, there was no agreement on a PIP during May or June 1982 when Barbano received his plan.

No one questions that Barbano's work performance was unsatisfactory and the Board sought to allow him an opportunity to improve that performance through a plan designed by its own personnel office which conformed, it felt, with the requirements of the Civil Service Reform Act of 1978. Such a plan, as it appears on the record, was designed to offer Barbano as opportunity to improve his performance within a specific period of time, and essentially tracked what the parties were negotiating in this respect, which was to be ultimately called a performance improvement plan. Whatever label is now used, training program, as suggested by the Board, or performance improvement plan, most clearly was an item on the bargaining table when Barbano's plan was implemented. The Board's argument that the Barbano plan must be found not to be a PIP, therefore, must be rejected.

As stated in United States Department of Labor, 7 FLRA 688 (1982) the General rule is that an agency is free to make changes in conditions of employment which are not covered by a collective bargaining agreement after timely notice of the proposed change to a union and absent a timely request to bargain thereon by the union. Here it is revealed that a condition of employment involving employee appraisals was established by previous practice.

As a practical matter, the Board has an obligation to perform certain personnel functions such as issuing memoranda to employees with work related difficulty, aiding employees in improving performance and in general following Civil Service regulations regarding such actions. Indeed, as the record shows, the Board in fulfilling this obligation had in the past issued memoranda to employees in several categories appraising them that some action was anticipated. However, as the parties recognized, those earlier regulations were altered and the Board had an obligation to negotiate with the Union concerning how it would implement such alterations prior to promulgation. Thus, the Board recognized its obligation and had engaged in negotiations regarding the implementation of a new performance improvement plan in order to conform to the new Civil Service regulations. The Barbano PIP unquestionably contained new standards for employee performance, including critical elements and performance standards never before used by the Board in appraising its employees. The General Counsel concedes that in the past the Board indeed issued notices of deficiencies or warnings, but counters that prior to the Barbano plan, no practice or policy existed regarding the use of PIP's based on an employees' critical elements and containing a detailed outline and timetable designed to raise employee performance to an acceptable level. The inclusion of such criteria in an appraisal or warning, the General Counsel maintains, is a substantial departure from previous Board policy. The Board insists that this is not a new term or condition of employment, eventhough no performance standards or

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critical elements previously existed which affected employees' rating.3/ In rejecting the Board's contention, it is found that previous appraisal memoranda issued by it did not take critical elements, performance standards or detailed timetables into consideration. It is further found, an employee appraisal is without doubt a condition of employment and that Barbano's PIP represented a substantial departure from the Board's prior practice in employee appraisals, and that any change in that practice without good faith negotiations is prohibited. Social Security Administration, Sutter District Office, San Francisco, California, 5 FLRA No. 63 (1981).

Alternately the Board contends that notice was given through various meetings held with the Union concerning Barbano's performance. Notice given in such circumstances has been found by the Authority to be insufficient. See for example, Department of the Air Force, Hanscom AFB, Massachusetts, 5 FLRA No. 88 (1981) where it was found that an agency must give specific notice of any intended change to the union. Although it is uncontraverted on the record that several meetings were held, there is no evidence of any notification to the Union that the Board intended to develop a PIP for Barbano or that a PIP was in any way discussed at any of these meetings. It therefore, cannot be inferred from general discussions concerning Barbano's employment that notification of a PIP was given the Union. Furthermore, the record does not suggest that the Board, during any of these meetings, made any reference to establishing a training plan or PIP, as was given to Barbano in May and June 1982, in which the Union acquiesced.

Case law prohibits an agency from initiating changes in employee working conditions during negotiations, absent agreement or impasse. Department of the Navy, 3 FLRA 413 (1980); Social Security Administration, San Francisco Region, 9 FLRA No. 11 (1982). Accordingly, while in the midst of negotiations, to effect such a change would be violative of the Statute. Clearly no impasse or agreement had been reached on the PIP. The evidence discloses that the parties continued to exchange proposals on the PIP, even after the May 27 memorandum was received by Barbano. Such an exchange of proposals during the entire period in question negates any potential for finding that impasse or agreement had been reached on the PIP.

The Board also argues that the memorandum to Barbano lacked "substantial adverse impact" on bargaining unit employees. Moreover, it

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3/ The Board's argument that the mention of critical elements and performance standards in the Barbano document misses the point. The question here is not the basis of evaluation for Barbano, rather, it is that certain aspects of the matter which were negotiable and indeed lawful were matters being discussed by the parties when it instituted certain unilateral changes with regard to the subject matter.

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maintains that an absurd result would be reached were it unable to give employees training with reference to work and job duties even after notice until a full agreement had been reached on an agreement and the agreement ratified and implemented. The short answer to the latter contention is simply that the Board could have continued to comply with the terms of the existing agreement in taking whatever action it sought in assisting Barbano. With regard to "substantial impact," while it is true that only one employee received such a PIP, the negotiations for a new appraisal system and PIP involved all unit employees and unilaterally implemention during the course of bargaining necessarily impacts on all unit employees. Notwithstanding that the direct impact of the particular plan is limited to employee Barbano, if taken in its proper context, the implementation of such a plan while the parties were engaged in negotiation certainly affected every unit employee. Under such circumstances, it cannot be contended that substantial adverse impact is not shown.4/

Based on the foregoing, it is found that employee appraisals are a condition of employment, the parties had not reached an impasse or agreement regarding the PIP and that the Union was not given sufficient notice of the Barbano PIP to allow it to engage in meaningful negotiations concerning such a plan, or to justify any inference that it had acquiesced in such a plan for Barbano. Accordingly, it is found that the Board violated section 7116(a)(1) and (5) of the Statute by unilaterally implementing a performance improvement plan for employee Barbano while performance improvement plans were a subject of negotiations and without giving proper notification to the Union and allowing it to bargain prior to implementation.

The Remedy

The General Counsel urges that in order to fully remedy the unlawful conduct herein, the Board must be ordered to revoke the June 16, 1982 performance improvement plan and that any action taken against Barbano as a result of his performance under the plan be rescinded.

In my view, a prospective bargaining order should fully remedy the bargaining violation herein. See Federal Correctional Institution, 8 FLRA 604 (1982). The performance improvement plan herein involves only one employee, Barbano and since the parties have bargained to a new agreement which includes a performance improvement plan, such an action as found violative of the Statute herein cannot be anticipated to recur. Furthermore, it is undisputed that the Board, as a practical matter, was required to take some action concerning Barbano's employment situation. While its action may have been improper, its impact, since such an action

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4/ The General Counsel's motion to strike certain portions of Respondent's brief is granted.

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cannot recur is nevertheless limited. In such circumstances, a status quo ante remedy would appear unwarranted.

Having concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by its implementation of a performance improvement plan while the matter was a subject of negotiations and without affording the Union proper notice and a reasonable opportunity to bargain concerning the implementation of the performance improvement plan, I recommend that the Authority issue the following order.

ORDER

Pursuant to Section 7118 of the Statute and Section 2423.29 of the Authority's Rules and Regulations, the Authority hereby orders that the National Labor Relations Board, Washington, D.C., shall:

1. Cease and desist from:

(a) Instituting any change in procedures concerning performance improvement plans for its employees without first notifying the National Labor Relations Board Union and Its Washington, D.C. Local, and affording it the opportunity to negotiate concerning the procedures to be observed in implementing any such change and concerning the impact such change will have on adversely affected employees.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify and, upon request, bargain with the National Labor Relations Board Union and Its Washington, D.C. Local, concerning the procedures to be observed in any performance improvement plans resulting from any adverse or unacceptable performance appraisals for employees adversely affected by such change.

(b) Post at its facilities at its Washington, D.C. Headquarters, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chairman of the National Labor Relations Board, or his designee, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards

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and other places where notices to employees are customarily posted. The Chairman shall take reasonable steps to insure that the notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

ELI NASH, JR.
Administrative Law Judge

Dated: June 1, 1983
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in procedure concerning performance improvement plans for our employees without first notifying the National Labor Relations Board Union and Its Washington, D.C. Local, the employees' exclusive bargaining representative, upon request and allow an opportunity to negotiate with respect to the procedures which management will observe in implementing such changes and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL notify and bargain in good faith with the National Labor Relations Board Union and Its Washington, D.C. Local, upon request, concerning the procedures to be observed in implementing any changes concerning performance improvement plans resulting from any adverse or unacceptable performance appraisals.

_____
(Agency or Activity)

Dated: _____ By _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If any employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: Washington Regional Office, P. O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8452.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION,
CHARLOTTE, NORTH CAROLINA
DISTRICT

Activity

and

Case No. 0-AR-418

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3509, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Harold D. Jones, Jr. filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The grievance involved herein concerned the grievant's reassignment from the position of claims representative trainee, GS-7, to the position of service representative, GS-7. A grievance was filed and submitted to arbitration claiming that the reassignment was not in accordance with the parties' collective bargaining agreement. The Arbitrator determined that the Activity had reassigned the grievant in order to avoid having to take disciplinary action against him, which action would have to be in accordance with Article 22, Disciplinary and/or Adverse Actions, of the parties' agreement. Consequently, the Arbitrator ruled that the reassignment was not in accordance with the agreement and directed that the grievant be returned to the position of claims representative trainee, GS-7.

In one of its exceptions the Agency essentially contends that the award, by directing the Activity to assign the grievant back to the position of claims representative trainee, GS-7, is contrary to management's right to assign employees under section 7106(a)(2)(A) of the Statute. In support of this exception, the Agency primarily argues that the remedy interferes with its right to assign employees and that the remedy has no basis in the parties' agreement. The Agency asserts that Article 22 cited by the Arbitrator relates solely to disciplinary actions taken by the Activity and that the agreement contains no prohibition

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against taking other actions in lieu of discipline. In opposition to this exception, the Union essentially argues that the award is not contrary to section 7106(a) because it simply enforces appropriate arrangements that the parties have properly negotiated for employees adversely affected by the exercise of any authority under section 7106(a).

The Authority has uniformly held that the plain language of section 7106(a) provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. E.g., Professional Air Traffic Controllers Organization and Federal Aviation Administration, 5 FLRA 763, 767 (1981). Therefore, the Authority has consistently held that no arbitration award under a negotiated grievance procedure may interpret or enforce a provision of a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under section 7106(a) of the Statute. Id. Under the language of section 7106(a)(2)(A) of the Statute and under the decisions of the Authority, it is clear that management has the right to assign employees in the agency, and it is likewise clear that the award at issue in this case interferes with the Activity's exercise of that right by rescinding management's assignment of the grievant from the position of claims representative trainee, GS-7, to the position of service representative, GS-7. However, in these same decisions the Authority has indicated that because the rights of management set forth in section 7106(a) are subject to section 7106(b)(2) and (3), 1/ an award that is claimed to interfere with rights under section 7106(a) that enforces an applicable procedure or appropriate arrangement which has been negotiated by the parties may not necessarily be contrary to section 7106(a). See id. at 768-69. Thus, in Internal Revenue Service, Austin District and National Treasury Employees Union, NTEU Chapter 52, 9 FLRA 672, 674 (1982), an award that simply enforced a properly negotiated appropriate arrangement under section 7106(b)(3) of the Statute was determined not to be contrary to section 7106(a) of the

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1/ Section 7106(b) pertinently provides:

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

. . . . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

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Statute. In IRS the appropriate arrangement for employees adversely affected by management's exercise of its authority to take disciplinary action which the parties had negotiated under section 7106(b)(3) provided that "[r]eassignments will not be used in lieu of discipline." The arbitrator in that case determined that the attempted reassignment of the grievant by the activity violated that provision and ordered that the grievant be made whole for the violation. As part of its exceptions the agency argued that the arbitrator's enforcement of that provision was contrary to management's right to assign employees under section 7106(a)(2)(A) of the Statute. In rejecting this argument, the Authority explained that the provision enforced by the arbitrator was properly agreed to as an appropriate arrangement which operated to prevent the use of reassignments in lieu of discipline in order that the legal, regulatory, and collective bargaining agreement procedures, protections, and arrangements afforded an employee against whom disciplinary action is taken may not be circumvented.

In terms of this case, in contrast to IRS and contrary to the argument of the Union that the Arbitrator was simply enforcing an appropriate arrangement, the Arbitrator did not enforce a negotiated provision of the parties' collective bargaining agreement providing an appropriate arrangement for employees adversely affected by the Activity's exercise of the authority under section 7106(a)(2)(A) to assign employees. Although the Arbitrator ruled that the reassignment was not in accordance with the agreement, the only provision cited in this respect relates to discipline and adverse actions. The provision does not in any respect relate to reassignments and in no manner purports to restrict the Activity's assignment of employees. Thus, the prohibition against the reassignment of the grievant was not founded on any specific negotiated agreement of the parties and was solely the creation of the Arbitrator. Although the U.S. Supreme Court has acknowledged that an arbitrator may legitimately bring his or her judgment to bear in reaching a fair solution of a dispute, the Court at the same time stated that an arbitrator may not legitimately "dispense his [or her] own brand of industrial justice." Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Consequently, the award, which interferes with management's right to assign employees in the agency and which does not constitute the enforcement of an applicable negotiated appropriate arrangement, is contrary to section 7106(a)(2)(A) and must be modified.

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Accordingly, the award is modified to provide as follows:2/

It is the Award of the Arbitrator that the Form 623-A for the period October 1, 1980 through September 30, 1981 given Mr. Jerry W. Drye by the Employer on October 21, 1981 was in accordance with the Negotiated Agreement. Accordingly, no remedy is directed.

Issued, Washington, D.C., March 5, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this decision, it is not necessary to address the other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE
MEMPHIS SERVICE CENTER

Respondent

and

Case No. 4-CA-20050

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the General Counsel filed exceptions to the scope of the Judge's recommended Order.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings and conclusions,[1/] and the recommended Order as modified herein.[2/]

1/ In addition to the precedent relied upon by the Judge, see also National Federation of Federal Employees, Local 1001 and Department of the Air Force, Vandenberg Air Force Base, California, 15 FLRA No. 154 (1984) (Provision 1) (wherein the Authority found that the clear intent of Congress was, with one stated exception in section 7121(b), to preclude unit employees from being represented in the negotiated grievance procedure by any person or organization other than the exclusive representative).

2/ The Authority agrees with the General Counsel's exception to the use of the word "employees" in section 1(a) and 2(a) of the Judge's recommended Order. The Order is modified to reflect the violation found.

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ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of Treasury, Internal Revenue Service, Memphis Service Center, shall:

1. Cease and desist from:

(a) Attempting to resolve a unit employee's grievance filed pursuant to the grievance procedure set forth in its negotiated agreement with the National Treasury Employees Union, the exclusive representative of its bargaining unit employees, by dealing directly with the husband of the employee grievant rather than with the exclusive representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, attempt to resolve Verna Brady's grievance by dealing directly with the National Treasury Employees Union, the exclusive representative of its bargaining unit employees.

(b) Post at its facility at the Memphis Service Center, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Memphis Service Center, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT attempt to resolve a unit employee's grievance filed pursuant to the grievance procedure set forth in our negotiated agreement with the National Treasury Employees Union, the exclusive representative of our bargaining unit employees, by dealing directly with the husband of the employee grievant rather than with the exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, attempt to resolve Verna Brady's grievance by dealing directly with the National Treasury Employees Union, the exclusive representative of our bargaining unit employees.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region IV, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309 and whose telephone number is: (404) 881-2324.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE MEMPHIS SERVICE CENTER Respondent	
and	Case No. 4-CA-20050
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Harry G. Mason, Esq.
For the Respondent

Linda J. Norwood, Esq.
For the General Counsel

Steven P. Flig
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on July 26, 1982 by the Regional Director for the Federal Labor Relations Authority, Atlanta, Georgia Region, a hearing was held before the undersigned on August 24, 1982 at Memphis, Tennessee.

This case arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based upon a first amended charge filed on July 22, 1982 by National Treasury Employees Union (herein called the Union), against Department of Treasury, Internal Revenue Service, Memphis Service Center (herein called Respondent).

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The Complaint alleged, in substance, that on or about August 20, 1981 Respondent by-passed the Union, the exclusive bargaining representative of its employees, and attempted to resolve a grievance theretofore filed by employee Verna C. Brady by meeting with James Brady notwithstanding the fact that the Union represented Verna C. Brady in respect to said grievance - all in violation of Section 7116(a)(1) and (5) of the Statute.

Respondent filed an answer dated Agusut 6, 1982 which denied the material allegation in the Complaint as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded an opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence addressed at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been and still is, the collective bargaining representative of Respondent's professional and non-professional employees, excluding management officials, supervisors, and other specified classifications.

2. The aforesaid appropriate unit of Respondent's employees is covered by a National Agreement effective by its terms from January 26, 1981 until January 26, 1985. The said agreement contains provisions, inter alia, regarding the filing of grievances by employees and the attendant procedural steps to be followed in the processing thereof.

3. Under date of April 9, 1981, and pursuant to Article 33 of the Agreement, unit employee Verna Brady, a GS-5 staffing clerk, filed a grievance with Respondent concerning her "Harassment, Insufficient Training, and Unfair Evaluations." Certain specified articles of the said Agreement were alleged in the grievance to have been violated by the employer. Verna Brady requested, as relief in the grievance, that the harassment cease; that Respondent render complete and proper training; that the employer apologize and remove documentation; that three unfair evaluations be corrected and resubmitted. The grievant also designated Deborah Hailey, Union Steward, as her official union representative in the matter.1/

1/ The parties stipulated that the Union's Chapter President, Katy Brown and Deborah Hailey represented Verna Brady at all four steps of the (continued)

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4. Between April 21, 1981 and June 18, 1981 Verna Brady's grievance was processed through four steps of the grievance procedure pursuant to the collective bargaining agreement. Meetings were held at each step and management, in each instance, disagreed that Verna Brady had been harassed, or that she received improper training. Respondent also denied that it violated the Agreement re the evaluations which were the subject of the grievance.

5. Following the fourth step grievance meeting on June 18, 1981, J. D. Smith, Chief, Resources Management Division, sent a letter dated June 26, 1981 to Union representative Katy Brown. Although he declared that no violation existed on the part of Respondent of the Agreement, Smith stated he would be willing to move Verna Brady out of her present position. Accordingly, he offered two positions to the employee as follows:

> (a) Supply Clerk - GS-5 - Facilities Management Branch. This position required weight lifting which would necessitate Verna Brady having a prior physical examination.
>
> (b) Clerk-Typist - GS-3 - Facilities Management Branch.

In the aforesaid letter Smith also stated that his offer to move the employee was in full and final settlement of the grievance; that "if you accept this offer please advise me in writing by July 13, 1981, and indicate which position Ms. Brady accepts." Verna Brady declined both positions. In the one instance the work was not in line with her usual duties and required much physical strength; in the other, the job was not comparable to her customary one.

6. Subsequent to the foregoing offers being made, another position was offered grievant Brady via the Union. Respondent indicated it would give the latter a GS-4 job in the Collection Branch. However, since the branch chief could not tell Verna where the position would be located, she refused to accept same.

7. During the pendency of her grievance at the fifth step Verna Brady became ill, and on August 19, 1981 she went home from work. She did not attend the fifth step grievance meeting, but Union representative Brown was present on Verna's behalf.

(continued)

grievance procedure; that the Union participated at each meeting as the employee's representative.

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8. On or about August 20 James Brady, husband of the grievant, telephoned William J. Lunsford, Chief of Labor Relations for Respondent. Brady told Lunsford he was concerned about his wife, Verna, who was very upset as a result of the events befalling her at work. Brady stated he would like to talk to Lunsford and discuss the matter.2/ The management official replied he would have to check and ascertain if it was alright to confer with the grievant's husband. Accordingly, Lunsford discussed it with Smith and Jerry Keith, Chief of Personnel, and they decided it was permissible since Lunsford was not involving himself in the grievance but only attempting to respond to Brady's concern. Thus, a meeting was arranged for a few days later.

9. Several days after the telephone call James Brady prepared to leave in the morning to meet the Chief of Labor Relations as scheduled. Verna Brady inquired as to her husband's leaving the house. James told his wife he was going to meet with Lunsford to discuss her work situation; that perhaps a way could be found to resolve the matter so Verna could overcome her illness caused by the pressure and tension. Verna Brady replied that it would not help, and that it was against the rules for Lunsford to say anything.

10. At the meeting between Brady and the management representative, on or about August 21, the grievant's husband told Lunsford that his wife felt she was being treated unfairly. Lunsford advised Brady that the latter's wife had been making a number of errors; that Respondent had to warn her re her performance; that unless she improved some action to resolve the problem would be taken, either a removal or downgrade. He remarked that the employer had offered Verna three positions; that the GS-4 file clerk position with Collections Branch was still open and if Verna would accept it, the performance problem would be resolved and they could destroy any records of her errors and counseling sessions. James Brady asked why his wife could not receive a GS-5 and Lunsford replied it could not be done because of documentation; that as soon as she qualifies in the new job Verna would have her 5 returned. The grievance itself was not discussed.3/

Conclusions

General Counsel submits that the action taken by Respondent's official, W. Lunsford, on or about August 20 when he met with the grievant's husband was in direct contravention of the Statute. It is contended that in dealing with James Brady and offering, or renewing an

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2/ Brady was not aware, at that time, that his wife had filed a grievance with Respondent.

3/ The record reflects and it is not disputed, that the Union was not informed beforehand of the meeting between James Brady and Lunsford.

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offer of, a job to his wife via Brady, Respondent was attempting to resolve the pending grievance; that such conduct constituted a by-passing of the Union - Verna Brady's bargaining representative - in violation of Section 7116(a)(1) and (5) of the Statute.

It is urged by Respondent that no attempt was made by Lunsford to settle the grievance, but the meeting was merely to accommodate Verna Brady's husband because of the latter's concern for his wife's health. Further, that the management representative was not "dealing" directly with James Brady; that he merely repeated an offer of a position which had been offered previously to the grievant. Moreover, Respondent insists that assuming arguendo the meeting was "technically improper," any violation is, in reality, de minimus in nature so that no remedial order is warranted.

It is true that all communications between management and employees, or their personal representatives, are not prohibitive. It was recognized under Executive Order 11491, as amended - the predecessor to the Statute herein - that the content of the communication and the circumstances surrounding it must be considered. However, communications which amounted to an attempt to by-pass the exclusive representative and deal directly with employees, or which threaten a promise benefit to employees were deemed violative of the Order. National Aeronautics and Space Administration (NASA), Washington, D.C., A/SLMR No. 457, 4 A/SLMR 806; Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, 4 A/SLMR 590, FLRC No. 74A-90.

The rights and responsibilites of the collective bargaining representative were codified under the Statute. Section 7114 defines these rights and duties and articulates clearly the obligation of an agency to negotiate with union representatives concerning conditions of employment.4/ Failure to abide by this obligation results in a violation of Section 7116(a)(5) of the Statute. Further, adherence to this duty to bargain with the Union representing employees requires that management not deal with employees in lieu thereof. The Authority has acknowledged this requirement and frowned upon management by-passing the exclusive representative in the matters involving personnel practices, policies, or working conditions. (See and Compare Kaiserslautern American High School et. al, 9 FLRA No. 28 where direct dealing with employees to gather information re employee morale was held not to constitute a rejection of collective bargaining or an illegal by-pass of the Union).

4/ Section 7114(a)(2) recites that the exclusive representative shall be given the opportunity to be represented at any formal discussion between one or more representatives of an agency and one or more employees, or their representatives, re a grievance or condition of employment. Since the Complaint does not allege that the meeting with James Brady was a "formal" discussion and no such contention is made by the General Counsel. I make no finding or conclusion in that regard.

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Applying the foregoing principle to the case at bar. I am constrained to conclude that, in meeting with the grievant's husband, management did by-pass the Union herein. While Respondent's intention may have been laudable - to offset Brady's concern for his wife's strain and stress - its official went beyond proper bounds during the discussion of Verna Brady's work performance. Thus, Lunsford did not confine his talk to the reasons for management's evaluation of Verna's performance. Rather did he offer, or renew an offer, of another job for the grievant with the understanding that acceptance thereof would solve the problem. Moreover, Lunsford agreed to destroy records of Verna's errors if the employee took the GS-4 position in the Collections Branch. Such an approach constitutes, in my opinion, an attempt to deal with James Brady in derogation of its collective bargaining representatives. Although the Union continued to represent Verna at all stages of the grievance procedure, Lunsford offered to dispose of the entire "problem" - which would have included a settlement of the grievance - via his negotiation or discussion with James Brady. Negotiations of this type should properly be made with the bargaining agent which has represented Verna at the five steps of the grievance procedure. By dealing with her husband Respondent has flouted its responsibility in this regard and run afoul of the Statute.

Respondent argues that, assuming arguendo, it violated the Statute, the violation is de minimus. In support of this argument Respondent cites Norfolk Naval Shipyard, 4 FLRA No. 91. In the cited case the employer's supervisor refused to allow a union steward to be released from duty on his own recognizance to conduct union related business, a long-standing practice. Upon being informed of his error, the supervisor allowed the steward to be released. The Authority concluded it would not effectuate the purposes and policies of the Statute to find a violation or issue a remedial order in view of the immediate rectification of the supervisor's conduct.

I do not view the situation herein to be analogous to that posed in the Norfolk Naval case, supra. Direct dealings with someone other than the bargaining representative over personnel matters, or working conditions, which affect the working conditions of employees is not de minimus. Such negotiations undermine the status of the union and are a clear interference with the rights of employees under the Statute. They are in marked contrast to an isolated act which was committed by the supervisor in the cited case. The attempt by Lunsford to resolve the matter (grievance) with the grievant's husband was not an isolated incident which results in a brief interruption or where the improper conduct was terminated immediately after it occurred. See Vandenberg Air Force Base, et. al, FLRC No. 74A-77, 3 FLRC 491 (1975). It went to the heart of the responsibility to honor collective bargaining obligations. Accordingly, and on the basis of the foregoing, I conclude that in dealing with James Brady re the personnel matter of Verna Brady and offering the employee a position through her husband to resolve her

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pending grievance, Respondent violated Section 7116(a)(1) and (5) of the Statute.

Accordingly, and in view of the foregoing, I recommend the Authority issue the following:

ORDER

Pursuant to Section 2423.10 of the Federal Labor Relations Authority's Rules and Regulations, and Section 7118 of the Statute, it is hereby ordered that the Department of Treasury, Internal Revenue Service, Memphis Service Center, shall:

1. Cease and desist from:

(a) By-passing the National Treasury Employees Union, the exclusive representative of its bargaining unit employees, and holding a meeting or discussion with employees, in respect to personnel policies and practices, employee grievances, or conditions of employment, without first notifying the National Treasury Employees Union and affording it the opportunity upon request to be present during such meeting or discussion.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the National Treasury Employees Union, the exclusive representative of its bargaining unit employees, of any proposed meeting or discussion with any employees, in respect to personnel policies and practices, employee grievances or conditions of employment, and affording the National Treasury Employees Union an opportunity upon request to be present during such meeting or dicussion.

(b) Post at its facility at the Memphis Service Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Memphis Service Center, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards

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and places where notices to employees are customarily posted. Reasonable steps shall be taken by the Director to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.20 of the Authority's Rules and Regulation, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM NAIMARK
Administrative Law Judge

Dated: December 21, 1982
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT

WE WILL NOT by-pass the National Treasury Employees Union, the exclusive representative of the bargaining unit employees, and hold a meeting or discussion with employees, in respect to personnel policies and practices, employee grievances, or conditions of employment, without first notifying the National Treasury Employees Union and affording it an opportunity upon request to be present during such meeting or discussion.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Labor-Management Relations Statute.

WE WILL notify the National Treasury Employees Union, the exclusive representative of the bargaining unit employees, of any proposed meeting or discussion with any employees, in respect to personnel policies and practices, employee grievances, or conditions of employment, and afford it the opportunity upon request to be present during such meeting or discussion.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 4, whose address is: 1776 Peachtree Street, NW., Suite 501, North Wing, Atlanta, GA 30309, and whose telephone number is (404) 881-2324.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-87

Union

and

Case No. O-AR-510

THE ADJUTANT GENERAL OF KANSAS,
THE KANSAS ARMY NATIONAL GUARD

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator A. Lee Belcher filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The issue before the Arbitrator involved the compatibility of civilian technicians' civilian employment and their military assignments. The employees represented by the Union are National Guard technicians who, as a condition of their civilian employment, must become and remain military members of the National Guard and must maintain the military grade specified for their technician positions. 32 U.S.C. §§ 709(b), 709(e)(1). In addition, in order that technicians are performing the same work as civilians as they would undertake as military members subsequent to mobilization, technicians' military assignments are generally required to involve the same duties as their corresponding civilian technician positions, that is, the military and civilian assignments must be "compatible." See generally National Association of Government Employees, Local R14-87 and Kansas Army National Guard, Topeka, Kansas, 15 FLRA No. 11 (1984). The grievance in this case arose when the adjutant general rescinded the policy of granting technicians a six-month, compatibility grace period. This policy granted a technician affected by a civilian personnel action that created an incompatible assignment a six-month period in which to obtain a compatible military assignment. On the advice of the National Guard Bureau that a grace period was contrary to law, the adjutant general rescinded that policy and announced that civilian and military assignments must be compatible on the effective date of the change affecting the technician's assignment. As a result a grievance was filed protesting the policy change. At the same time, a bargaining proposal was submitted by the Union essentially proposing a twelve-month grace period. The Agency declared the proposal not to be within the duty

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to bargain and the Union filed with the Authority a petition for review of a negotiability issue. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, Topeka, Kansas, Case No. 0-NG-667. The grievance was not resolved and was submitted to arbitration while the negotiability issue was pending before the Authority.

The Arbitrator determined that the Agency had acted improperly by rescinding the policy of granting the six-month grace period. However, because of his doubt as to the legality of a six-month grace period and because the Arbitrator was of the opinion that this issue would be resolved by the Authority in the negotiability case, the Arbitrator as his award directed that the grace period be reimposed only from the date of the award until the date of the decision by the Authority in the negotiability case.

The Agency in its exceptions to the award essentially argues that the award is deficient because the imposition of a grace period in which a civilian technician is allowed to obtain a compatible military assignment is contrary to the intent and implementing policy of the Technicians Act, 32 U.S.C. § 709. The Authority agrees.

In the related negotiability case the Authority ordered the petition for review dismissed because the disputed proposal was outside the duty to bargain. Kansas Army National Guard, 15 FLRA No. 11 (1984). In that case the Authority characterized the requirement that civilian and military assignments be compatible on the effective date of the change affecting the technician's assignment as concerning a military aspect of technician employment -- the timing of military assignments which must be made to maintain compatibility between military and civilian functions. In this regard, the Authority has uniformly held that the military aspects of technician employment are "totally mandated by law." Id. at 2; Association of Civilian Technicians, Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania, 3 FLRA 50, 55 (1980). Therefore, in terms of this case, the Authority finds that the Agency has sufficiently established that the mandate intended by the Technicians Act with respect to this military aspect of technician employment precludes the Arbitrator's imposition of a period of time during which a technician could permissibly maintain an incompatible military assignment. Consequently, the award is deficient as contrary to law and is set aside.

Issued, Washington, D.C., March 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL COUNCIL
OF FIELD LABOR LOCALS

Union

and

Case No. O-NG-702

DEPARTMENT OF LABOR

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises an issue regarding the negotiability of the following Union proposal:

> Should the funding of DOL's Supplemental Appropriations be passed after an employee suffers a loss of pay through furlough, DOL will grant each employee adversely affected an amount of administrative leave equal to the number of hours/days spent in furlough status. Such administrative leave must be used by October 1, 1983.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination. The Union's proposal would require the Agency to grant employees who suffered a loss of pay through furlough administrative leave equal to the number of hours or days spent in furlough status in the event that the Department of Labor's supplemental appropriations legislation is subsequently enacted. The Agency contends that the proposal is inconsistent with the Federal Personnel Manual (FPM), Supplement 990-2, Book 630, Subchapter S11-5, decisions of the Comptroller General and the use of appropriated funds as provided under 31 U.S.C. § 628.1/ Thus, the

1/ Revised and recodified at 31 U.S.C. § 1301(a) (1982).

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Agency contends that it has no obligation to bargain over the Union's proposal pursuant to section 7117(a) of the Statute.2/

Contrary to the Agency's claim that its authority to grant administrative leave is limited to only those situations enumerated in the FPM, it is firmly established that the head of an agency has discretion to grant administrative leave to its employees in other situations as well.3/ The applicable section of the FPM, Subchapter S11-5 of FPM Supplement 990-2, Book 630,4/ in addition to stating that the granting of administrative leave is within the agency's discretion also refers to the examples listed therein as "[s]ome of the more common situations in which agencies generally excuse absences without charge to leave . . . ." Such language clearly indicates that an agency's discretion is not limited only to the given situations. Therefore, even assuming that the cited provision of the FPM is a Government-wide regulation, the Agency has failed to show that the Union's proposal is inconsistent therewith.

2/ Section 7117 of the Statute provides, in pertinent part, as follows:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

3/ See Long Beach Naval Shipyard, Long Beach, California, and International Federation of Professional and Technical Engineers, Local 174, AFL-CIO, et al., 7 FLRA 362 (1981), and Merit Systems Protection Board, 62 Comp. Gen. 1 (1982).

4/ Subchapter S11-5 of the FPM Supplement 990-2, Book 630, states as follows:

> S11-5 Administrative Discretion
>
> a. General. With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed. Some of the more common situations in which agencies generally excuse absence without change to leave and in addition to those specifically given above, are covered in this section.

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Furthermore, as to the Agency's claim that the granting of administrative leave as requested by the proposal is inconsistent with Comptroller General's decisions, the Authority notes that the Comptroller General has issued a decision wherein he found the retroactive granting of administrative leave for employees in a non-pay status to be consistent with the FPM and Federal law. In Merit Systems Protection Board, 62 Comp. Gen. 1, 3 (1982), which involved the Merit Systems Protection Board's furlough of its employees, the Comptroller General ruled:

> [T]he Merit Systems Protection Board may, in its discretion, grant administrative leave retroactively to the employees affected by the partial shutdown, as a proper exercise of its administrative discretion to the extent to which funds had been appropriated and were available and adequate on the dates in question to cover the amount of the gross salaries of the affected employees.

Thus, under circumstances strikingly similar to those involved herein, the Comptroller General has found appropriate the retroactive granting of administrative leave for periods in which employees were in non-pay status. Accordingly, the Agency's claim that the Union's proposal is inconsistent with Comptroller General's decisions is rejected.

Similarly, the Agency's claim that the Union's proposal would require the improper use of appropriated funds is rejected. As noted by the Comptroller General, an agency does not violate appropriation legislation by granting administrative leave to employees for periods spent in non-pay status provided the agency had the funds available during the period in which employees occupied this status. Insofar as the Agency has not alleged, and the Authority has no reason to believe, that the Agency lacked the appropriate funds at the time that employees were proposed to be in non-pay status, the Agency has failed to show that the proposal would violate any appropriation act as suggested by the Agency.

Thus, the granting of administrative leave as proposed by the Union, which is a matter affecting the working conditions of unit employees, is within the discretion of the Agency. Since the Agency has not shown that the exercise of such discretion through negotiation on the proposal would be inconsistent with law or with Government-wide regulations, the proposal at issue herein is within the duty to bargain under the Statute.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the proposal.5/

Issued, Washington, D.C., March 11, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY ADMINISTRATION

Respondent

and

Case No. 2-CA-20183

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.1/ Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions2/ and recommended Order.

1/ In agreement with the Judge's conclusion, the Authority denies General Counsel's motion for summary judgment based on the Respondent's untimely answer to the complaint. In applying section 2423.13(b) of the Authority's Rules and Regulations and finding good cause for considering the Respondent's delayed answer, the Authority notes particularly, as found by the Judge, that the Respondent did advise the General Counsel prior to the hearing as to its defenses to each allegation of the complaint; that there has been no showing that the General Counsel was prejudiced in any manner by the delay; and that the Respondent's answer stated a meritorious defense to the complaint, as found by the Judge in dismissing the complaint.

2/ The Authority adopts the Judge's conclusion that the Respondent did not change a past practice concerning the use of franked envelopes. In so ruling, the Authority notes the General Counsel's exception to the

(Continued)

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ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-20183 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 11, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

Judge's reliance on "knowing consent" as the standard for creation of a past practice. While the Authority agrees that knowing acquiescence over a significant time may indicate past practice, the record does not support a finding of knowing acquiescence. Instead, the record herein is replete with Respondent's prompt efforts to terminate the use of franked envelopes upon learning of this practice by union officials.

Additionally, in adopting the Judge's conclusion that there was no change in past practice, the Authority does not reach and should not be construed as passing upon whether the Respondent would have violated section 7116(a)(1) and (5) of the Statute if it had discontinued a past practice of allowing franked envelopes to be used by the Union for labor-management communications.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No.: 2-CA-20183

Daniel H. Green, Esq.
For the Respondent

Lee Mingledorff, Esq.
For the General Counsel

William Nussbaum
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on December 30, 1982 by the Regional Director for the Federal Labor Relations Authority, New York, NY Region, a hearing was held before the undersigned at New York, NY on April 15, 1983.

This is a proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a second amended charge filed on November 24, 1982 by American Federation of Government Employees (herein called the Union), against Department of Health and Human Services, Social Security Administration (herein called Respondent).

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The Complaint alleged, in substance, that on or about September 15, 1981 Respondent unilaterally changed the past practice of permitting officials of American Federation of Government Employees, Local 3369 to use postage paid (franked) envelopes to send grievances and other labor-management communications to Respondent's officials. Further, that this action occurred without affording the Union, or Local 3369, an opportunity to negotiate as to the substance, impact and implementation of the change - all in violation of Section 7116(a)(1) and (5) of the Statute.

In its Answer[1]/ Respondent denied the existence of a past practice re the permitted use of franked envelopes, as well as any unilateral change thereof, and the commission of any unfair labor practices in violation of the Statute.

All parties were represented at the hearing. Each was afforded an opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact[2]/

1. At all times material herein, the Union has been, and still is, the certified bargaining representative of a consolidated nationwide unit

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[1]/ The Answer, although due on January 24, 1983, was not filed until the date of the hearing herein. (Respondent's Exhibit 1). General Counsel filed a Motion for Summary Judgment since, under Section 2423.13(a) of the Rules and Regulations, the Answer was not filed within 20 days after the Complaint was served. Moreover, under Section 2423.13(b) of said Rules the failure to file such an answer constitutes an admission of the allegations in a complaint. Counsel for Respondent stated at the hearing that he believed an answer was filed, but conceded no certification of service was on hand. Further, it is undisputed that Respondent's Counsel informed General Counsel, prior to the hearing, of the defenses as to each allegation in the Complaint. In view of the fact that General Counsel was so apprised, and no new matter introduced by the Answer, the undersigned denied the Motion for Summary Judgment at the hearing. In its brief General Counsel renews its Motion in that regard. For the reasons advanced by the undersigned, supra, and since no prejudice is shown to exist,the Motion for Summary Judgment is again denied.

[2]/ Note should be taken that the complete set of marked exhibits will be found in those exhibits herein labeled "DUPLICATE". Those labeled "ORIGINAL" are not all properly marked.

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of certain employees of Respondent, including all employees in the District and Branch offices of the Respondent in New York and New Jersey, with specified exclusions as well as employees in the Trenton, New Jersey District office.

2. At all times material herein Respondent has recognized American Federation of Government Employees, Local 3369, as an agent and representative of the Union for the purposes of collective bargaining for certain employees in the State of New York.

3. There are six components of Social Security Administration, Region II. One of these is field operations which has over 100 offices in the New York region. Local 3369 represents employees in about 53 of these district and branch offices. Within the field operations structure of Region II the levels of management are as follows: at the lowest level are the branch and district managers; above them is the area director who is in charge of the district offices; and the regional office is headed by a commissioner and an assistant regional commissioner.

4. During the period December 1977 - December, 1979 John Riordan was an on-site union representative at the South Bronx, NY District office. He was also third vice-president for grievances of Local 3369. As on-site representative Riordan, testified he used franked[3]/ envelopes (postage prepaid) a few times per month, or less, when dealing with management re employee grievances, negotiating with the agency, filing an unfair labor practice charge or representing an EEO complainant. In December, 1979 Riordan became President of Local 3369.

5. William N. Nussbaum, President of Local 2369 and President of New York-New Jersey Council of Locals, AFGE, testified[4]/ to a meeting held in December, 1979 or early 1980 attended by himself, Riordan, and two management officials: Nancy Williams (labor relations staff member) and Norman Seifer (Deputy Assistant Regional Commissioner). He recalled that

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3/ "Franked" mail, under 39 USCA 3210, refers to mail used by members of Congress. Other mail, as used by agencies or department, under 39 USCA 3202 is designated as "penalty" mail. The terms have been used interchangeably by the parties as well as the witnesses. However, the undersigned has referred to such mail or envelopes used by Local 3369 herein, and which is the subject of the dispute, as "penalty" or "postage paid".

4/ Nussbaum was called as adverse witness by Respondent.

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the parties agreed no problem existed re continuing the piggyback[5] system of sending mail. Further, that management said the union could not use penalty envelopes for internal union business. With respect to using such envelopes for labor-management communications, the management officials said they were not sure about it - they would look into the matter.[6]

6. Nancy Williams testified that, during negotiating sessions in 1979, the topic of using penalty envelopes by the union was discussed. According to her testimony, management permitted the piggyback mail use. With respect to other mail, the employer sanctioned penalty envelope use on a case to case basis. Thus, if the Union wanted to submit proposals or make comments voluminous in nature, management would accede to a request by the bargaining representative to use penalty mail. Williams stated, moreover, that the Union did not prevail in its request, during 1979 negotiations, to use penalty envelopes for communications between it and management.

Further testimony from this witness reveals that she did learn in 1980 (before mid-May) that Local 3369 was using penalty mail on its own initiative for communications with management. She gained this knowledge prior to her reassignment in May, 1980 to the Baltimore office. Williams testified she contacted her headquarters office for advice and guidance on how to proceed. She was told that the office would have to check with the postal authorities or the general counsel; that it would advise her "on what the agency's position was". No final decision was furnished Williams before her transfer to Baltimore, and she gave no specific warnings to Nussbaum re the use of penalty envelopes. The discussions with the Union representative were, according to Williams, limited to the piggyback system. Arrangements with Nussbaum precluded mass mailing and no individual envelope for union correspondence. In response to the query as to whether the agency ever permitted Local 3369 the use of penalty envelopes, Williams replied:

> "There have been occasions where, if we felt there was sufficient interface with management, we would on a

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5/ "Piggyback" system is described as a means whereby Local 3369, when communicating with union officials or employees in other districts or branches, includes its mail in a large envelope sent by management to such other district or branch. In effect, this combines the internal mail of the union with that being sent by the agency. The union does not utilize piggybacking to communicate with the regional office since mail is not sent there from the district.

6/ Nussbaum also testified that, at this meeting, management said that penalty envelopes could be used for labor-management correspondence.

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case by case basis authorize the use of it, but there was never a blanket authorization for use of the frank by the union, by any of the unions in the region."

7. Riordan testified that, upon assuming the presidency of Local 3369, he commenced using penalty envelopes in 1980 on a daily basis when communicating with management re labor relations matters. In so doing, he wrote letters to the regional commissioner, assistant regional commissioner, deputy assistant regional commissioner, area directors, district and branch manager. Further, the record reveals that penalty envelopes were stored in the local's supply desk, which is how Riordan procured them.

8. Deputy Assistant Regional Commissioner Norman Seifer testified there had never been a policy sanctioning use of penalty envelopes by Local 3369 on its own initiative. Further, correspondence was opened by secretaries and management did not receive the envelopes. In 1980 Seifer became aware that Local 3369 was using postage paid mail in its correspondence. He instructed labor relations specialist Ron Sobel to contact the union and tell them it was not an acceptable practice. Seifer also told Sobel to call headquarters and ascertain whether it was legal for Local 3369 to use penalty mail. While awaiting word as to the legality thereof, the agency had - according to Seifer - made the union aware of the fact that it did not sanction penalty envelopes. Headquarters did advise that it wanted to do some additional research on the problem. Finally, a response was received from SSA or Postal Service indicating that the penalty mail should not be used by Local 3369.

9. Between January and May, 1981 - as indicated by G.C. Exhibits 5(a) - 5(s) - Union President Riordan wrote letters to management re such matters as grievance, arbitration, negotiability concerns, request for official time, information under FOIA, a manual, and waiver of fees for copying certain materials. All of the foregoing were sent in penalty envelopes. Of these letters, four were sent to Alex Bussey, Assistant Regional Commissioner, one each to Area Directors Howard Feuer and John Moorehead, one to Martin Weinberg, District Director, one to the Regional Commissioner, and one to the Federal Mediation and Conciliation Service.

10. In a letter dated January 2, 1981, Area Director Feuer wrote Stanley Chodos, 5th vice-president for grievances for Local 3369. Feuer stated that Chodos was being granted official time to discuss a grievance at the East Bronx office. He reminded Chodos that the use of penalty envelopes for personal business was prohibited and a grievance is considered a personal matter.

11. By letter dated May 1, 1981, addressed to William Nussbaum, President of New York-New Jersey Council, Assistant Regional Commissioner Bussey stated that the Council is continuing to use postage paid (franked) envelopes for unauthorized purposes. Five examples of such use were set forth therein involving (a) an invitation to a hearing on "the Geoffrey

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Keating case" to the Acting Director of Human Resources as well as to the Acting Associate Commissioner, OMBP; (b) copies of the "Federal Unionist" mailed to the aforesaid Acting Director of Human Resources and to the Commissioner of Social Security;[7] (c) the continuing use by Local 3369 of penalty envelope to mail internal correspondence to on-site representatives. Bussey reminded Nussbaum in the letter that the use of such envelopes (postage paid) is prohibited and requested the cessation of such practice.

12. A reply to the foregoing letter was made by Nussbaum in a letter dated May 4, 1981. The Council representative stated therein he was unaware that the Council engaged in such a practice; that the use of penalty envelopes was discussed with management many years ago, and it was agreed the Union could use a piggyback system for interoffice mailing; that management recognized other areas where it was permissible to use penalty envelopes, i.e., mailing 3rd step grievance letters to area directors or labor relations correspondence to Regional offices. Nussbaum further stated that other uses were authorized, and those were accepted without objection by management. He referred to the fact that the five examples were referable to one local; that representatives of other locals used penalty envelopes in ways not cited by Bussey in his May 1, 1981 letter. Nussbaum concluded by stating that, while it is a local union matter, the Council would be glad to meet and discuss the issue.

13. Labor Relations Specialist Ron Sobel, who works under the direction of Seifer and Assistant Regional Commissioner Alex Bussey, assumed his position in May, 1980 when he replaced Nancy Williams. He testified to a meeting held in June, 1981 attended by himself, Seifer, and union representatives Riordan and Richard Kirchner. The union officials stated thereat they believed the use of penalty envelopes was permitted, and Seifer advised them it was only acceptable in piggyback situations or where management specifically gave the union an envelope. Sobel testified, further, that Riordan said he thought Seifer was wrong - there may have been some changes. At Riordan's request, Siefer agreed to check into it again and ascertain whether the union was now authorized to use penalty envelopes.

Sobel also testified that Local 3369 was supplied with penalty envelopes only (a) in piggyback situations, (b) where an arbitration case was pending, and management would send the union a postage paid envelope in which to respond. Further, that prior to May-June, 1981 Respondent was not doing any review of the mail - what was coming in. In June, 1981 the agency realized it had a problem re the use of penalty mail. It conducted a review which showed that, except for Local 3369, the use privilege was being properly conducted. According to Sobel the use of penalty envelopes

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[7] An FLRA decision, published by Local 3369, was also included in the letter to the Commissioner.

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was only permissible in situations involving piggyback mail and where management furnished such envelope for reply, as in an arbitration matter.

14. A meeting occurred in June or July, 1981 between representatives of Local 3369 and management. Present for the former were Riordan and Richard Kirchner, executive vice-president. Representing the agency were Ron Sobel and Norman Seifer. Testimony by Sobel reflects that the local's officials stated they thought they were permitted to use penalty envelopes. Seifer retorted there had been no authorization to use such envelopes except in piggybacking or situations where management provided the union with an envelope. He agreed, upon Riordan's request, to check into it and see if it was now authorized. Sobel testified the local was usually supplied with penalty envelopes when the parties were working out language on an arbitration case, or for use in piggyback situations.

Riordan testified to a somewhat different version of what occurred at the aforesaid meeting. He stated that a discussion ensued re penalty envelopes, and Seifer informed the union representatives these envelopes could not be used for internal mail. The parties disagreed on whether the agency had to pre-pay for the envelopes. In regard to using the penalty mail for labor-management communications, Riordan commented it had been the practice for a long time and Seifer never brought up the matter before. The latter, according to Riordan, replied there was a question as to its legality and he would "get back" to the union officials after checking it out. The use of such envelopes for labor-management matters was left open, and Riordan continued to send mail of this nature in penalty envelopes.[8/]

15. By letter dated September 15, 1981 Assistant Regional Commissioner Bussey wrote union official Nussbaum reiterating his concern about the use of postage paid agency envelopes by unions. Bussey stated that the latter are not authorized such use; that this policy is based on the U.S. Postal Service Domestic Mail Manual, guidelines issued by GSA, and on SSA Directors and Personnel Guide - all of which limit the use of such envelopes and mail services to official business. After setting out the language of Part 137.22 of the Domestic Mail Manual, Bussey wrote that union officials are not acting as officials or employees of the Federal Government and are not authorized official mailing privilege. He further commented that such officials may only use penalty envelopes if specifically provided with them. The letter closed by indicating that

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[8/] Riordan sent three letters to management which were dated June 22, 1981. One concerned a request for filing cabinets, a second letter sought the use of a private room to speak with employees during a forthcoming visit to the Brooklyn office, and the third letter enclosed night differential claim forms with a request for a status report. All three letters were sent in penalty envelopes.

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Local 3369 has continued to use such envelopes for unauthorized purposes, and Bussey offered to meet with Nussbaum to obtain compliance with Federal Regulations.

16. A meeting was scheduled with Riordan to discuss the use of penalty mail. It was cancelled by the Union since Riordan wanted to obtain legal advice on the matter. Although a second meeting was arranged, Riordan asked that it not be held because he was awaiting work from the national office. A third meeting was scheduled for October 20, 1981 but it was never held.

17. In a letter dated October 20, 1981 Bussey wrote Nussbaum that the October 20 meeting was pointless since Local 3369 continued the improper use of postage paid mail. Bussey stated that, as an example, management received dues deduction requests from the union in such envelopes. He reiterated that union officials are not permitted to use postage paid envelopes except where management has supplied one for purposes of responding to a specific request.

18. By letter dated November 5, 1981 the Regional Commissioner (SSA) wrote the Manager-Postmaster in New York City re the case by a union of postage paid envelopes for "union activities". He pointed out that one union official used such mail to write various members of Congress. The Commissioner asked for a definitive answer re the use of penalty envelopes for union activities.

19. Postal Inspector C. C. Hallien wrote a letter dated November 24, 1981 to Riordan re the "use of penalty envelopes for union business". The Inspector informed Riordan that such use was not in accordance with Postal Regulations. He requested the union representative to cease such use and stated that reimbursement might be sought for unpaid postage in the future.

20. The Acting Manager-Postmaster, in a letter dated November 25, 1981, replied to the Regional Commissioner's letter of November 5 re the use of postage paid mail for union activities. He informed the Commissioner as follows:

> "Only official mail relating exclusively to the business of the Government of the United States mailed by officers of the executive branch may be sent as Official Federal Government Mail. The example you submitted of a mailing made by an employee organization does not fall within this definition of official mail and is, therefore, prohibited by postal regulation."

21. Riordan wrote Hallien on December 11, 1981 stating that the union does not use penalty envelopes for "Union business." He stated that they have been used for official government business relating to labor-management relations i.e. communications with higher agency officials,

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processing employee complaints, and grievances. Riordan asked that he be apprised as to whether the use of such envelope, even when supplied by the agency, may be proper on the union's part.

22. By letter dated December 14, 1981 Bussey wrote Riordan that the use of penalty envelopes for any union mail, including inter-office mail, is illegal based on information management received from the Post Office. Bussey stated that its use must stop immediately or action would be taken by management.

23. Warren C. Fretwell, executive vice-president of American Federation of Government Employees, Local 3342, wrote a letter on December 23, 1981 to Ted Troy, Director, Office of Mail Classification (U.S. Post Office). The union official referred to the fact that Social Security Administration advised him the Postal regulations prohibited the use of "franked" envelopes by government employees who are addressing concerns in their capacity as employee representatives. Fretwell commented he thought such prohibition difficult to believe, and he requested a formal opinion re the use by employee representatives of the "franking privilege".

24. A reply letter dated February 1, 1982 was sent by Troy to Fretwell re the use of official mail. The Director adverted to Section 137.22(a) Domestic Mail Manual, the postal regulation which specifies that officers of the U.S. Government may send such mail when it relates exclusively to U.S. Government business. Further, that under Section 137.21 of said Manual departments or agencies must reimburse the Postal Service the equivalent of postage and fees due for the official mail service they receive. In regard to the propriety of matter sent as Federal Government mail, Troy stated they rely upon the departments or agencies to determine whether it is entitled to be sent as official mail. He concluded, "Thus, it is appropriate for the Social Security Administration to make its own determination with respect to what matter will be sent as official SSA mail and paid for out of its appropriations or funds." (Underscoring supplied.)

25. Respondent's District Manager, Robert Berger, sent a letter dated April 12, 1982 to Riordan. Berger informed the union representative that he proposed to reprimand the latter for insubordination in the continued use of postage paid U.S. Government penalty envelopes after being advised to discontinue this practice. The letter stated that on September 15, 1981 Bussey had written Nussbaum advising him that such envelopes are, under postal regulations, only to be used for official business; that Bussey's letter had notified Nussbaum that union officials did not act as officials of the Federal Government and thus were not authorized to use this mailing privilege unless specifically provided such envelopes. Berger recited that its use had continued and a letter was sent on October 20, 1981 to Nussbaum and all members of the Council advising them that union officials were prohibited from using such envelopes except where management provided one for responding to a specific request. The District Manager stated, further, that the Assistant Commissioner had

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written Riordan on December 14 that the use of postage paid envelopes for any union mail must stop; that despite those notifications, the local union officials continued its practice.

Berger gave as examples of the use by the Local of penalty envelopes the following: (a) forwarding dues withholding requests, (b) communication with the Federal Labor Relations Authority, (c) transmittal of Women's Programs and AFL-CIO materials, (d) other correspondence between union officials, (e) union initiated correspondence with Federal management official.

26. Management issued a reprimand to Riordan in May, 1982.9/

27. By letter dated March 8, 1983 Peter D. Spencer, Respondent's Director of Labor Relations, wrote Authur B. Johnson, spokesperson AFGE General Committee re Postage-Paid Envelopes. Spencer stated that Respondent's January 17, 1983 letter10/ was a reminder that unions are not authorized to use such envelopes. He further commented that although management infrequently permitted AFGE representatives to do so, it did not constitute a past practice. Moreover, SSA did not agree to such use by said representatives. Spencer concluded by stating that, while officials of the U.S. Government are authorized to use penalty envelopes, unions are not; that union officials may use such envelopes only when expressly authorized by management to do so.

Conclusions

There are two primary issues for consideration herein: (1) whether a past practice existed herein of allowing Local 3369 to use penalty envelopes or mail to communicate with Respondent re labor-management matters; (2) assuming arguendo such practice did exist as a condition of employment, whether Respondent was obligated to, and failed to, negotiate with Local 3369 regarding the prohibited use by the union of penalty envelopes for such matters.

With respect to the first issue, General Counsel takes the position that the agency permitted the use of such postage paid mail by Riordan from December, 1979 to September 15, 1981. It contends management did not show disapproval of such use by Local 3369; that Riordan was not made aware of any prohibition thereof; and that, in truth, the question of such use was under study by management.

9/ The exact nature or wording of the reprimand does not appear in the record, nor was it introduced as an exhibit herein.

10/ This particular letter (January 17, 1983) was not introduced as an exhibit.

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The Authority has recognized that parties may establish a condition of employment by practice, or other form of tacit or implied agreement. Moreover, once this practice has been established and becomes a term of employment, it may not be altered by either party without bargaining thereon. Internal Revenue Service and Brookhaven Service Center, 6 FLRA No. 127 (1981); Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64 (1980).

The law is also settled in the public Sector that to establish a practice - which ripens into a condition of employment - certain requirements must be met. Thus it must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33 (1982). As aptly put by Judge Devaney in Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA No. 98 (1980), a practice to constitute a condition of employment must:

(a) be known to management;

(b) responsible management must knowingly acquiesce; and

(c) such practice must continue for some significant time.

Turning to the case at bar, it is necessary to resolve the question as to whether the use of penalty envelopes by Local 3369 ripened into a practice which may be deemed a condition of employment. While not free from doubt, I am persuaded that, based on the factors considered infra, the record does not support the conclusion that management knowingly approved the use by Riordan of postage paid mail for communications with Respondent. That it entertained some doubt of the legality thereof is not denied. However, I am reluctant to conclude that such uncertainty was equatable with an acceptance by Respondent that Local 3369 was entitled to use penalty envelopes.

Record facts reveal that prior to 1980 the local union involved herein had not been given carte blanche to use postage paid envelopes. The policy, as established, called for the bargaining agent to use such privilege on a 'case-to-case' basis. When management sought a response from the union re an arbitration matter, or the like, it included such penalty envelope in correspondence to the union for its use. Further, in contract negotiations on a regional level in 1976 management acceded to the use of piggyback mail by the union representatives in New Jersey. This privilege was accorded Local 3369 in 1977.

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Upon Riordan's becoming President of Local 3369 in December 1979 and assuming his duties in January, 1980, the parties again discussed the use of penalty envelopes. New Jersey Council representative Nussbaum testified that at a meeting around that time management declared the union could use such mail for labor relations matters only. He also testified upon cross-examination that, at that meeting, management representative stated they were not sure - they would look into the matter. On the other hand, Nancy Williams, who attended this session, testified no such privilege re the use of penalty mail, was ever extended to Local 3369 or any other local union. The foregoing does not convince me - especially since Nussbaum's own testimony leaves it in doubt - that at this early meeting, upon Riordan's becoming President of Local 3369, the agency accorded the union representative full privilege to use penalty mail in dealing with management in the future.

General Counsel insists, however, that Riordan embarked upon a daily practice of using such envelopes which the agency tacitly approved during its use by Local 3369 for a year and a half. In support of this contention it adverts to 19 letters, introduced as exhibits, which were sent to the regional and other offices between January - May, 1981. All of those were sent in penalty envelopes, and they dealt with union concerns involving grievances and matters wherein Local 3369 represented employees during their employment. It is maintained by General Counsel that no explicit word was received from Respondent until September, 1981 prohibiting the use of such envelopes; that any communications by management prior thereto did not contain that prohibition; and that Local 3369 was entitled to conclude the practice was sanctioned by the agency.

The Authority has refused to recognize the existence of a past practice, however, unless actual knowledge thereof by management was established. See Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 3 FLRA No. 106 (1980). The record herein reflects that much of the incoming mail is separated by the secretaries from the envelopes, and the latter are not seen by agency officials who need the mail. Thus, for a considerable period of time after Riordan commenced using penalty mail, it appears that many of the addressees (management officials) would not have known or been aware of the practice by Local 3369.

It is also urged that inasmuch as Respondent's letter of May 1, 1981 referred to several specific uses by Local 3369 of such mail - all of which involved matters other than labor-management relations - the agency impliedly approved the use of such envelopes when communicating with Respondent on labor affairs. While such an inference might be drawn, I am not satisfied that the mention of those specific instances per se establishes clear consent by the agency to use this mail as contended. It is also inferable that management was not, as heretofore mentioned, informed that Local 3369 used penalty envelopes in its communications.

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As indicated in Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, supra, a practice must be open and notorious before management may be charged with its existence. Moreover, the record is replete with evidence to show that Respondent frowned upon Local 3369 using penalty mail except when provided with such an envelope. Thus, on January 2, 1981 Area Director Feuer explicitly stated, in his letter to Stanley Chodos, a vice-president of Local 3369, that the use of penalty envelopes by the union for discussing or considering grievances with management was prohibited. Further, Deputy Assistant Regional Commissioner Seifer, when he learned in 1980 of the fact that Local 3369 sent its mail in postage paid envelopes, instructed labor relations specialist Sobel to advise the union this usage was not acceptable. Although the record does not reflect that this particular message was imparted to Riordan, it does demonstrate that management did not condone or approve of the practice.[11]/ In June, 1981 Seifer again reported to the union that, despite the latter's belief to the contrary, management had never sanctioned the use of penalty envelopes except for piggyback mail and when such an envelope was provided by Respondent for a response to it.

Prior to maintaining a claim that an agency has changed a past practice unilaterally and thus demonstrating an unfair labor practice, the General Counsel assumes the burden of establishing the existence of such past practice. In my opinion that burden has not been met in the instant case. The record does not support a finding that Respondent knowingly and consistently approved the use by Local 3369 of penalty envelopes when communicating with management re labor matters. See Department of Defense, Deparment of the Navy, Polaris Missile Facility Atlantic, Charleston, S.C., 6 FLRA No. 67 (1981). It is incumbent upon General Counsel to show that such use was accepted by the agency and adopted by it as an agreed-upon practice. Wihtout such acknowledgement and condonation one can scarcely deem the custom to be a practice which has ripened into a condition of employment. The facts herein belie such acceptance. A careful review of the testimony and exhibits herein induces me to believe that, at best, a misunderstanding existed on the part of Local 3369 re the use of penalty mail. This, however, falls short of a necessary factor to establish a past practice, i.e. that management knowingly consented to same. I conclude that the burden of proving the existence of a past practice - as recognized by the Authority - in respect to the alleged use of penalty envelopes by Local 3369 has not been met.

11/ Cf. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA No. 48 (1981) where managements' efforts to discontinue a practice was not communicated to the union. In contrast, however, to the case at bar, the attempts to discontinue a practice was not clearly communicated to supervisors. Moreover, some supervisors continued the practice. The practice in the cited case was clearly established, and, in that respect, is also distinguishable from the situation herein.

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In view of the foregoing, I conclude Respondent did not change a past practice as alleged in the Complaint and did not violate Section 7116(a)(1) and (5) of the Statute as contended therein. Accordingly, I recommend dismissal of the Complaint in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: February 1, 1984
Washington, DC

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Respondent

and

Case No. 9-CA-30480

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued her Decision in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and the General Counsel filed an opposition to the Respondent's exceptions.1/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified below.2/

The Judge found that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over the impact and implementation of a reorganization involving the Respondent's Northwest Mountain Region. The Judge also found that the Respondent's failure to notify the Charging Party's designated representative for

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1/ The Charging Party filed an untimely opposition to the Respondent's exceptions which has not been considered by the Authority.

2/ The Authority specifically adopts the Judge's finding that the scope of the complaint was broad enough to cover all aspects of the Respondent's reorganization involved herein.

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purposes of bargaining over the reorganization constituted a further violation of section 7116(a)(1) and (5). To remedy these unfair labor practices, the Judge recommended a status quo ante remedy and a nationwide posting of the remedial unfair labor practice notice.

In agreement with the Judge, but for the following reasons, the Authority finds that the Respondent's refusal to bargain over the impact and implementation of the reorganization constituted a violation of section 7116(a)(1) and (5) of the Statute.

Subsequent to the Judge's Decision in this case, the Authority issued its decision in Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington, 14 FLRA 644 (1984). That case involved the same Respondent, Federal Aviation Administration (FAA), the same union as Charging Party, Professional Airways Systems Specialists (PASS), and an identical assertion by the agency that provisions in an expired agreement negotiated by the union's predecessor constituted a waiver of the union's right to bargain over various changes in unit employees' conditions of employment. In that case the Authority determined, in part, that following the expiration of an agreement, either party may terminate matters contained in the agreement relating to permissive subjects of bargaining. Since the provisions in the expired agreement waiving certain bargaining rights were permissive in nature and the union indicated that it no longer wished to be bound by such provision, the Authority found that the agency could not insist upon the continuation of the waiver provisions and deny the union its statutory right to bargain.

In the instant case, and as more fully explained in the Judge's Decision, the Respondent sought to limit the Charging Party's right to negotiate over the impact and implementation of a reorganization to one of consultation by virtue of waiver provisions contained in the expired agreement. Upon learning of the reorganization, the Charging Party's President, who previously had informed the Respondent that he was the only authorized representative to bargain over reorganizations, made numerous requests to bargain. In the Authority's view, and based upon the reasons more fully set forth in Federal Aviation Administration, Northwest Mountain Region, supra, once the Charging Party indicated that it wished to negotiate over the impact and implementation of the reorganization and not merely to consult, the Respondent was no longer free to insist upon a continuation of the provisions in the expired agreement which limited the bargaining obligation to consultation. By refusing to bargain with the Charging Party, upon the latter's request, the Authority finds, in agreement with the Judge, that the Respondent violated section 7116(a)(1) and (5) of the Statute.3/

3/ The Authority also notes the Respondent's withdrawal of its exceptions to this particular finding of the Judge based on the Authority's decision in Federal Aviation Administration, Northwest Mountain Region.

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In further agreement with the Judge, the Authority finds that the Respondent's failure to notify the duly authorized bargaining representative of the Charging Party for the purpose of bargaining over the impact and implementation of the reorganization constituted a violation of section 7116(a)(1) and (5). See Department of Transportation, Federal Aviation Administration, San Diego, California, 15 FLRA No. 86 (1984), and cases cited therein.

However, while the Authority adopts the Judge's conclusions with respect to the unfair labor practice findings, the Authority finds that the recommended status quo ante remedy and the nationwide posting of a remedial notice are not warranted in the circumstances of this case.

First, with respect to the status quo ante remedy, the Judge recommended that the Respondent be ordered to rescind implementation of the reorganization involved herein, and restore all conditions of employment affecting unit employees which were in effect prior to the reorganization, "including offering to relocated and former employees the option of returning as employees to their former duty stations." In reaching this result, the Judge looked to Federal Correctional Institution, 8 FLRA 604 (1982), to find that the Respondent did not properly notify the Charging Party's designated bargaining representative; that the Charging Party made repeated requests to bargain; that the Respondent willfully refused to bargain; that the impact of the reorganization on unit employees was severe; and that a return to the status quo ante would not create an excessive degree of disruption in the Northwest Mountain Region. The Authority does not agree with the Judge's assessment of the degree of disruption which would be created by a status quo ante remedy. In this connection, the record reveals that the reorganization is part of an overall plan of the FAA to create larger sector organizations and reduce smaller sector elements in an effort to consolidate existing work centers and more efficiently utilize the work force. The Respondent sought to do this by reducing the number of sector headquarters from eleven to five and by closing various field offices within those sector headquarters. The Respondent then proceeded to reassign employees to accord with the new sector configuration. The record indicates that some bargaining unit employees transferred to new locations, that others resigned rather than relocate, and that still other employees retired from Federal employment altogether.4/

4/ The record also indicates that on November 23, 1983, a temporary injunction was granted by the U.S. District Court for the Western District of Washington essentially prohibiting the FAA from further transferring or reassigning bargaining unit employees in the Northwest Mountain Region without first notifying the Charging Party and bargaining regarding the impact and implementation of such changes. As of the date of the decision herein, the temporary injunction remains in full force and effect.

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The effect of the Judge's recommended remedy would be to reestablish offices which were scheduled to be closed; relocate employees, at their option, to their former posts of duty; and offer reemployment to employees who resigned or retired and provide them the option of also returning to their former posts of duty, all until such time as the parties bargained concerning the impact and implementation of the reorganization. In the Authority's view, this would seriously disrupt the accomplishment of the Respondent's mission and the efficiency of its operations. As previously noted, the stated purpose of the overall sector reorganization was to more fully utilize existing resources. To accomplish this, the Respondent consolidated various organizational elements and eliminated others. An order which would now require the Respondent to reestablish organizational components and to rehire and relocate employees would seriously impair the Respondent's ability to efficiently utilize its resources and effectively maintain its operation. The Judge even recognized that the proposed remedy might create an imbalance in the workload but suggested that the Respondent could draw upon other personnel to fill in any resultant gaps. The Judge further surmised that in any event few employees would exercise their option to relocate for what might be only a temporary period of time pending negotiations. In the Authority's view, this suggestion would create even more inefficiency by retaining personnel where the Respondent has determined they are no longer needed and by taking personnel away from those locations where the Respondent has determined they are needed to perform the work of the agency.

The Authority is not unmindful of the serious consequences which flow to unit employees as the result of an agency reorganization, such as involved herein. In such a situation, a goal of collective bargaining should be to mitigate the adverse effects and disruption which are incurred by the affected employees. In the Authority's view, an order which would require the Respondent to give priority consideration to transferred unit employees for existing or future vacancies, for which they are qualified, in the Northwest Mountain Region, and which would require the Respondent to bargain with the Charging Party to the extent consonant with law and regulation concerning the impact and implementation of the reorganization would effectuate the purposes and policies of the Statute.5/ With respect to the bargaining order, the Authority notes particularly that the reorganization has not been fully implemented and that certain employees who were scheduled to be transferred were still at their duty stations and had not been relocated as of the date of the hearing in this matter.

5/ See, e.g., U.S. Government Printing Office, 13 FLRA 203 (1983) and Bureau of Government Financial Operations Headquarters, 11 FLRA 334 (1983).

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As to the posting of a remedial unfair labor practice notice, the Authority finds that a posting in the Northwest Mountain Region, where the instant violations have occurred, will best effectuate the purposes and policies of the Statute. Thus, consistent with the Authority's findings in similar situations involving FAA's unlawful insistence on a waiver of the Charging Party's statutory rights, the posting of a remedial notice at the locations where such unlawful conduct has occurred is warranted. See Federal Aviation Administration, Northwest Mountain Region, supra; Federal Aviation Administration, San Diego, California, supra; and Department of Transportation, Federal Aviation Administration, Los Angeles, California, 15 FLRA No. 21 (1984). The Authority notes, moreover, that the unlawful conduct in the instant case occurred prior to the issuance of the Authority's decision in Federal Aviation Administration, Northwest Mountain Region. As there is no indication that the FAA has refused to abide by the Authority's decision in that case or in the other cited cases, or that it will continue to engage in such unlawful conduct in the future, the Authority finds no basis on which to order a different posting requirement than that ordered herein.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Federal Aviation Administration, Washington, D.C., shall:

1. Cease and desist from:

(a) Any further implementation of the sector reorganization in the Northwest Mountain Region without first notifying the Professional Airways Systems Specialists, the exclusive representative of its employees, and affording it an opportunity to negotiate on the procedures to be observed in any further implementation of the reorganization and on appropriate arrangements for employees who have been or may be affected by the reorganization.

(b) Failing to give notice of any planned reorganization to the designated representative of the Professional Airways Systems Specialists, the exclusive representative of its employees, for the purpose of bargaining to the extent consonant with law and regulation.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

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(a) Give priority consideration to transferred unit employees for existing and future vacancies, for which they are qualified, in the Northwest Mountain Region.

(b) Upon request by the Professional Airways Systems Specialists, the exclusive representative of its employees, and to the extent consonant with law and regulation, bargain over the procedures to be observed in implementing the sector reorganization in the Northwest Mountain Region, and on appropriate arrangements for employees who have been or may be affected by the reorganization.

(c) Post at its facilities in the Northwest Mountain Region, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Such forms shall be signed by the head of the Northwest Mountain Region, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 11, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT further implement the sector reorganization in the Northwest Mountain Region without first notifying the Professional Airways Systems Specialists, the exclusive representative of our employees, and affording it an opportunity to negotiate on the procedures to be observed in any further implementation of the reorganization and on appropriate arrangements for employees who have been or may be affected by the reorganization.

WE WILL NOT fail to give notice of any planned reorganization to the designated representative of the Professional Airways Systems Specialists, the exclusive representative of our employees, for the purpose of bargaining to the extent consonant with law and regulation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL give priority consideration to transferred unit employees for existing and future vacancies, for which they are qualified, in the Northwest Mountain Region.

WE WILL, upon request by the Professional Airways Systems Specialists, the exclusive representative of our employees, and to the extent consonant with law and regulation, bargain over the procedures to be observed in implementing the sector reorganization in the Northwest Mountain Region, and on appropriate arrangements for employees who have or may be affected by the reorganization.

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_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IX, Federal Labor Relations Authority, whose address is: 530 Bush Street, Room 542, San Francisco, California 94108 and whose telephone number is: (415) 556-8106.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

FEDERAL AVIATION ADMINISTRATION WASHINGTON, D.C., Respondent and PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, Charging Party	Case No.: 9-CA-30480

John J. Callahan,
Counsel for Respondent

Joseph E. Kolick, Jr.
Counsel for Charging Party

Stefanie Arthur,
Counsel for the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454. 92 Stat. 1192, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the "Statute," and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

On July 14, 1983, Counsel for the Charging Party (also referred to herein as the "Union" or "PASS") filed an unfair labor practice charge alleging violations of Sections 7116(a)(1) and (5) of the Statute.

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The General Counsel of the Federal Labor Relations Authority ("Authority") investigated the charge and, on October 12, 1983, filed the complaint initiating this proceeding. The complaint alleges that Respondent, "[o]n or about April 22, 1983, decided to reorganize the National Airspace System (NAS) Airway Facilities Sectors in Respondent's Northwest Mountain Region by, inter alia, reducing the number of Sector Headquarters within said Region from eleven to five," without notice to the Union's designated representative, Howard Johannssen; that implementation of the reorganization began on or about May 2, 1982; and that since at least April 22, 1983, and continuing to date, Respondent has failed and refused to negotiate with the Union, after several requests, concerning the impact and implementation of the reorganization. By such acts, the complaint alleges that Respondent has engaged, and is engaging in unfair labor practices, in violation of Sections 7116(a)(1) and (5) of the Statute.[1/] See paragraphs 7 through 10 of the complaint, which is in evidence as General Counsel's Exhibit 1(d).

Respondent admits that it commenced implementation of the reorganization, on or about May 2, 1983, and alleges that, consistent with the Authority's ruling in U.S. Nuclear Regulatory Commission ("NRC"), 6 FLRA No. 9, 6 FLRA 18 (1981), it notified the union representatives designated in "the controlling labor agreement," and requested their "comments", which were not received. See paragraphs 6, 7d and 9 of Respondent's answer, which is General Counsel's Exhibit 1(e). Respondent also admits receiving a request to bargain from the Union's president, but alleges that, under "the controlling labor agreement," it was only required to consult. See paragraph 8b of Respondent's answer. The "controlling labor agreement" to which Respondent refers is a 1977 one entered into with a predecessor union, Federal Aviation Science and Technological Association ("FASTA").

[1/] Section 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
>
> . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter. . . .

Section 7102 (2) provides that one employees' right is the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter."

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A hearing was held on the matter in Seattle, Washington, on December 6 and 7, 1983. The parties appeared, introduced exhibits, and examined witnesses. Briefs were received from Respondent, on January 4, 1984, and from the General Counsel and the Charging Party, on January 5.

Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

Findings of Fact[2/]

1. At all times material herein, Respondent has been, and is, an agency within the meaning of Section 7103(a)(3) of the Statute.

2. At all times material herein, the Union has been, and is, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

3. Since December 31, 1981, the "PASS" has been certified as the exclusive representative of an appropriate nationwide consolidated unit of employees of Respondent including, inter alia, field maintenance employees employed in Respondent's Northwest Mountain Region, Airway Facilities Division. This certification followed an election, supervised by the Authority, in which PASS defeated the incumbent union, FASTA. See TR 56-57.

4. Prior to December 31, 1981, PASS had been certified in smaller units of Respondent, going back to 1977. Since February 1977, Howard E. Johannssen has been President of PASS.

5. The Director of Respondent's Northwest Mountain Region ("NW Region") is Charles Foster. The NW Region covers the seven northwestern states within the continental United States. There are six operating program divisions within the NW Region: airway facilities, which is the division involved in this action and will be referred to herein as the "AF Division"; aircraft certification; flight standards; air traffic; airports; and air civil aviation security.

6. Since August 22, 1982, Frederick M. Issac has been Manager of Respondent's AF Division in the NW Region, and in such capacity has been

---

2/ The following abbreviations will be used in this decision. "TR" refers to the transcript. "GC" refers to the exhibits of the General Counsel, and "R" to those of Respondent. "GCBr" refers to the brief of the General Counsel, "RBr" to that of Respondent, and "CPBr" to that of the Charging Party. Corrections to the transcript are made pursuant to 5 CFR 2423.19(r), as set forth in Appendix A, hereto.

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a supervisor and/or management official within the meaning of Section 7103(a)(10) and/or (11) of the Statute, and an agent of Respondent.

7. A primary function of an AF Division is to maintain equipment. In the NW Region there are now five "AF Sector Headquarters" which report to the AF Division (R 10). Each "Sector Headquarters" covers a specific geographic area, and has "Sector Field Office[s]" and "Unit[s]" reporting to it (R 10). The maintenance work is done in the Sector Field Offices. An AF Division Manager has full responsibility over all employees in the division.

8. Respondent has a National Airspace System Plan ("NASP") dated December 1981 which incorporates "the Airway Facilities 80's Maintenance Program" ("80's Program"). See page 5 of GC 11. Among other things, the 80's Program calls for "consolidation of existing work centers and more efficient utilization of the work force" (ibid). This maintenance program is in accordance with FAA Order 1100.127B, which "provides for sector configurations and organizations commensurate with the need for larger sector organizations and a corresponding reduction of subelements such as sector field offices, sector field units, and sector field office units" (underlining in original) (GC 16, para 5d, page 2).

9a. On January 8, 1982, soon after certification, the President of PASS, Mr. Johannssen wrote to the Administrator of the Federal Aviation Administration ("FAA") as follows:

> As you know on December 31, 1981, the Professional Airways Systems Specialists (PASS) was officially certified as the exclusive bargaining representative for the nationwide unit of systems specialists. As such, PASS has the right to bargain collectively with the FAA with respect to the conditions of employment of all employees in the unit, and the FAA has the duty to refrain from implementing any changes in conditions of employment with unit members prior to conclusion of good faith bargaining. We look forward to the early commencement and speedy conclusion of a comprehensive collective bargaining agreement. In the interim, however, PASS will demand strict compliance by the FAA with its obligation to bargain collectively and to refrain from unilateral changes. Specifically, PASS demands notification of all proposed changes affecting conditions of employment and bargaining to the full extent permitted by law prior to implementation of such changes. This, of course, includes notice of changes which the FAA contends may be made unilaterally as a management right, and full bargaining on impact and implementation procedures regarding such changes prior to implementation.

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In this regard, PASS is aware that the FAA, in the near future, plans to publish its "80's Maintenance Program." PASS expects to receive a copy of this document and further expects to receive specific notice of any changes affecting conditions of employment proposed thereby. PASS also demands that the FAA refrain from implementing any such changes prior to good faith bargaining over the changes themselves or impact and implementation procedures as may be appropriate.

In conclusion, I wish to state that I am looking forward to fruitful and harmonious labor relations between PASS and FAA. Let's be certain to get off on the right foot.

See GC 2.

b. FAA responded on January 21 to PASS's January 8 letter. Its Director of Labor Relations, E.V. Curran wrote as follows:

This acknowledges your January 8 letter to the Administrator in which you describe the PASS certification and state among other things that "In the interim, however, PASS will demand strict compliance by the FAA with its obligation to bargain collectively and to refrain from unilateral changes."

The Federal Aviation Administration is well aware of its obligation to deal with recognized labor unions and will continue to do so. However, these obligations do not extend to being influenced by threats and demands of labor organizations. Rhetoric such as that contained in your January 8 letter has previously worked to the extreme detriment of another union formerly representing FAA employees. I hope your organization is not dedicated to the confrontational tactics that proved so destructive to that organization and its members.

Let me assure you that the FAA is fully committed to recognizing the legitimate interests of all duly certified labor unions within the law but will not be receptive to rhetoric such as your January 8 letter.

See GC 3.

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10a. On January 14, 1982, a PASS Regional Vice-President, Lawrence Sump, called Mr. Johannssen to advise him of information he was receiving from employees in the NW Region about changes, particularly a reorganization.

b. In a telephone conversation on January 18, Mr. Johannssen made a demand to bargain over the changes to a Mr. Payne, who is in the labor relations section of FAA's NW Region. Mr. Payne responded that: "Well, you know what our position is, Howard. We will consult" (TR 44). Mr. Payne told Mr. Johannssen that a reorganization plan had not yet been approved. Mr. Payne offered to provide information to the two PASS Regional Vice-Presidents whose regions encompassed the NW Region. Mr. Johannssen advised Mr. Payne that he was the negotiator and should receive the information.

11a. On February 2, 1982, Mr. Johannssen wrote to the FAA Administrator to advise him that "unless specific notice to the contrary is given, the only representative authorized to negotiate on behalf of PASS with respect to the following subjects is Howard E. Johannssen, President of PASS" (GC 4, page 1). Among the subjects named were: (1) "The closing, consolidation or relocation of FAA facilities;" and (2) "Any reorganization of the FAA or its subdivisions" (ibid). The Administrator was then advised that "notice of proposed changes in conditions of employment relating to the above areas should be sent to the undersigned [Mr. Johannssen]" (ibid). The Administrator was advised that "notice of proposed changes in local or regional conditions of employment pertaining to other subjects should be given to the PASS Regional Vice President responsible for the area affected" (ibid). The Administrator was advised that local Union representatives at each facility were designated to handle grievances and act as representatives at investigatory interviews and formal discussions.

b. On February 8, 1982, Mr. Curran replied to the February 2 letter to the Administrator. He stated:

> As stated previously, it is the FAA's position that the provisions of the FASTA/FAA agreement continue in effect until a mutual agreement to the contrary is reached. Therefore, to the extent your letter of February 2 is not inconsistent with the provisions of the FASTA/FAA agreement, we concur in your designation as outlined in that letter.

See GC 5.

12a. The FASTA/FAA agreement was entered into in 1977. It was made effective for two years, with an automatic renewal provision unless either party gave written notice to the other of a desire to amend or

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terminate the agreement. See R 1, page 76. Several articles in the agreement are relevant here:

> ARTICLE 47 - TECHNOLOGICAL CHANGES AND FACILITY CLOSING AFFECTING THE WORK FORCE
>
> Section 1. The Employer agrees to notify and consult with the Union at the regional level, as far in advance as possible, prior to proposing or implementing technological changes or facility closings affecting the size or composition of the bargaining unit work force. . . .
>
> Section 3. Prior to any proposed reorganization of the work force, the Union will be consulted at the regional level.
>
> ARTICLE 54 - CHANGES IN THE AGREEMENT
>
> Section 1. The Parties agree to negotiate prior to implementing changes in personnel policies, practices and matters affecting working conditions which are within the scope of the Employer's authority when those changes are in conflict with this agreement.
>
> Section 2. The Parties agree to consult prior to implementing changes in personnel policies, practices and matters affecting working conditions that are within the scope of the Employer's authority and that are not specifically covered by this agreement.

See R 1, pages 58 and 68.

b. It is FAA's "national policy" that it and its managers will "consult but not bargain with PASS," on matters not covered by the FASTA/FAA agreement (TR 118).

c. It is also FAA's national policy that it and its managers will notify PASS's regional vice-presidents, and not Mr. Johannssen, in accord with its prior contract with FASTA. See TR 86.

d. Since December 31, 1982, PASS has demanded to negotiate on some 200 proposed changes in conditions of employment. FAA consistently has offered to consult and refused to negotiate. See TR 58.

13a. In a February 2, 1982, letter to Mr. Curran, Mr. Johannssen referred to "FAA's voluntary decision to abide by the terms of the FASTA/FAA agreement" and the Union's "appreciation for [FAA's] cooperation in this regard" (GC 6). Mr. Johannssen stated further:

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Of course, you should not misunderstand this appreciation to mean that PASS accepts any waivers of rights contained in the FASTA agreement. As stated in my January 9, 1982 letter to Administrator Helms, PASS stands ready to negotiate to the full extent permitted by law on all appropriate subjects.

See GC 6.

b. On February 8, Mr. Curran replied that its so-called "voluntary decision" was based on a "careful reading of pertinent case law" which indicated to it that "a prior negotiated agreement remains in effect until a mutual agreement to the contrary is reached," citing NRC, 6 FLRA No. 9. See GC 7.

14. On May 12, 1982, PASS and FAA began negotiations on a collective bargaining agreement. Mr. Johannssen testified that the parties were "not making any headway whatsoever" (TR 80). Mr. Johannssen was a candid, credible witness. His statement was not contradicted by any witness for Respondent. Accordingly, it is credited, as later modified by Mr. Johannssen, himself, who testified that at the last bargaining session, held in September 1982, agreement was reached on two articles, after a week's work and with the presence of a representative from the Federal Mediation and Conciliation Service. In August 1982, PASS filed some 65 negotiability appeals with the Authority. At the bargaining table, Respondent has taken the position that "just about everything was nonnegotiable" (TR 81).

15. On May 28, 1982, Mr. Johannssen wrote to the FAA Administrator to express his concern about "persistent reports of local and regional FAA management proposals to make changes in conditions of employment" and to express his view that "[n]otice and attempted bargaining at the local level is not sufficient" but, rather, should be part of "the contract talks" (GC 8, page 1). Mr. Johannssen expressly revoked any prior bargaining authority given to any PASS representative other than himself, and stated that he should be notified of all proposed changes in conditions of employment of bargaining unit members.

16a. On December 27, 1982, pursuant to the NASP of FAA, the Director of the NW Region sent to the FAA Administrator, for approval, a proposed reconfiguration of its "airway facilities sectors in the Northwest Mountain Region to reduce the number from eleven to five" (GC 11, page 2). It was stated, in the transmittal letter, that this reconfiguration would align the NW Region with "the 80's Maintenance Program" (GC 11, page 2). The letter states that sector staffing would be gradually reduced until FY 1990, at which time there would be 107 to 124 positions in various sectors. These figures include the entire sector staffing, the sector field offices, the sector field units, and the sector headquarters. See TR 164.

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b. On March 29, 1983, the FAA Administrator gave his approval to the proposed reconfiguration. See R 2.

c. This step in the 80's Program applied to sector headquarters offices and will be referred to herein as the "sector reconfiguration."

17. On January 31, 1983, Mr. Johannssen advised Mr. Issac that he had received "information on your proposed reorganization of the workforce in the Northwest Mountain Region" and demanded bargaining (GC 10). No evidence of a response to Mr. Johannssen's letter was adduced.

18a. However, by a letter dated April 22, 1983, Mr. Issac did advise Bobby Mullins, a PASS Regional Vice-President and one of two who represent bargaining-unit employees in the NW Region, that the Administrator had approved the NW "Regional Reconfiguration Plan" (GC 11). Mr. Issac advised that some changes had been made since a copy of the initial draft reorganization proposal had been furnished, and enclosed an updated copy. Mr. Issac commented that Mr. Mullins had not provided any comments in response to the initial draft and could provide them to the approved plan, pursuant to Article 47, Section 3 of the FASTA/FAA agreement. Mr. Issac advised that implementation would begin in May, with a target completion date of June 30, 1984.

b. A similar letter of the same date was sent to Lawrence Sump, the other PASS Regional Vice-President who represented employees in the NW Region. See R 3.

c. On May 11, 1983, Mr. Johannssen wrote to Mr. Issac, in response to Mr. Issac's April 22 letter to Mr. Mullins. Mr. Johannssen made a demand to bargain "concerning the Northwest Mountain Region Plan to consolidate the Airway Facilities General NAS Sectors" (GC 12), either in the context of the contract negotiations, or by separate negotiations. Mr. Johannssen received no response to his letter.

19. On May 16, 1983, Mr. Issac did write to Mr. Sump and Mr. Mullins to advise them that implementation of "the consolidation of our general NAS sectors in the Northwest Mountain Region" was proceeding, that it appeared that seven bargaining unit members would actually relocate, with all relocations to be completed by June 30, 1984, and that any "comments" by them would be considered (GC 13(a) and (b)). Mr. Issac was not willing to negotiate about the changes. See TR 90-91. A copy of each letter was sent to Mr. Johannssen.

20. On May 24, 1983, Respondent's Acting Director of Labor Relations, Joseph Noonan, wrote to Mr. Johannssen in reply to a letter from him of May 16, which is not made a part of the record. It refers to Mr. Johannssen's designation of himself "as the sole PASS representative authorized to deal with FAA management on behalf of units consolidated

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into the national unit" (R 5). It advises that FAA will follow the procedures in the agreements which cover these units and will, "[i]n other words, notify the union representative at the local or regional level as appropriate when consultation or negotiation is required under an existing agreement" (R 5). It refers to the differences of opinion between PASS and FAA over the applicability of Article 54 of the FASTA/FAA agreement. It urges the PASS to consult, while the Authority settles the issue of whether FAA must bargain, instead of merely consulting with it.

21. On June 27, 1983, Mr. Issac sent a letter to all "Northwest Mountain Region Airway Facilities Personnel" concerning the "Sector Reconfiguration" (GC 19). It was the third one in a series designed to keep them informed of the status of the sector reconfiguration. It advised that 42 employees would be directly affected -- 17 being relocated, 13 electing to retire or resign, and 12 being accommodated in place. It advised that the largest majority of these personnel changes would occur prior to September 30, and all but a few prior to December 31. It announced that the next major milestone in the reconfiguration would occur on July 10, when Colorado Springs, Grand Junction, Casper, and Great Falls would "cease to operate as independent sectors' and would be "converted to sector field offices" and the new expanded sector boundaries for Billings, Denver and Salt Lake City would become effective (GC 19). It advised that completion of the reconfiguration would occur on January 10, 1984, at which time the new sector boundaries for Seattle and Portland would be implemented and the Boise and Spokane Sector Offices would close.

22. On July 11, 1983, counsel for PASS served upon FAA and the NW Region a copy of the unfair labor practice filed in this action. It alleges that:

> Since on or about April 22, 1983 and continuing to date the FAA, through its agents [sic] Frederick M. Issac, Manager, Airway Facilities Division, Northwest Mountain Region, has begun and is continuing to implement changes in working conditions of employees represented by the Professional Airways Systems Specialists ("PASS") without providing proper notice to or bargaining with PASS regarding such changes by, among other things, implementing a reorganization of the FAA's Northwest Mountain Region which has resulted or will result in changes to the reporting relationships, work assignments, work schedules and other conditions of employment of unit employees.

See GC 1(a).

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23a. On July 19, 1983, Mr. Issac sent a letter to Mr. Mullins and Mr. Sump, with a copy to Mr. Johannssen, in which he enclosed a copy of the "Northwest Mountain Region Airway Facilities Division Operations Staffing Plan for 1984 through 1990." See R 6 and 8. Mr. Issac sent it to them in hope that it would "reduce the personal apprehension of [our] employees by providing them with time frames for office reductions as far in advance as possible and confirm the fact that each incumbent w[ould] receive an offer of a similar position, at the same grade level, within the Northwest Mountain Region before their position is eliminated" (R 6 and 8).

b. On July 28, 1983, Mr. Johannssen wrote to Mr. Issac and demanded to bargain over this plan. See R 7. Mr. Issac did not make any meaningful response to this letter. See TR 80. At the time he received the letter, Mr. Issac was not then willing to negotiate over this plan. See TR 98.

c. This plan was introduced into evidence as General Counsel's Exhibit 14. It is dated July 15, 1983. A stated purpose of the plan is "To provide management with a systematic approach for transition to the 80's Maintenance Program" (GC 14, page 2). One of assumptions upon which the staffing plan is based is the sector headquarters staffing. See GC 14, page 5, para. 4. This plan will be referred to as the "sector staffing plan" portion of the 80's Maintenance Program. Unlike the sector reconfiguration (GC 11), the sector staffing plan did not have to be approved by the FAA Administrator, but only by Mr. Issac. See TR 150. While Mr. Issac's office (AF Division) implemented the sector reconfiguration plan, the sector staffing plan was implemented by the Sector Headquarters Offices. See TR 151. While the sector reconfiguration plan had no impact on service to users of FAA equipment, the sector staffing plan did, as it affected staffing in the Sector Field Offices which maintain FAA facilities.

24a. On September 13, 1983, Mr. Issac sent a letter to Lloyd G. Burrell, an FAA employee located in Olympia, Washington. The letter advised him that, due to reductions in the field maintenance staffing, Mr. Issac proposed to relocate him to the Rock Springs, Wyoming, field sector office, at the same grade (GS-11), effective November 27. Failure to accept would subject him to removal from Federal service, according to the letter.

b. Mr. Burrell objected to the relocation, for health reasons and because he had not had an opportunity to discuss alternative locations. See GC 23.

c. Mr. Issac has since decided to find a location other than Rock Springs for Mr. Burrell, who was still at Olympia at the time of the hearing. See TR 106.

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d. This relocation of Mr. Burrell is a part of the sector staffing plan. See TR 107 and GC 14, page 15. It calls for the relocation during the 4th quarter of FY-1984. As of the date of the hearing, five employees remained at Olympia, with their supervisor already transferred to Seattle. See TR 108.

25a. On September 14, 1983, Harry J. Macdonald received a letter similar to that received by Mr. Burrell. Mr. Macdonald was advised that he was to be relocated from Olympia to Moses Lake, Washington, at the same GS-11 grade, effective November 27.

b. Mr. Macdonald also objected to the relocation. See GC 24. After considering his objections, Mr. Issac rejected them, on November 10, 1983, but delayed the reassignment until January 8, 1984. See GC 25.

c. Mr. Macdonald's relocation is also part of the sector staffing plan. See TR 107 and GC 14, page 15.

26. On September 23, 1983, the Donald G. Coones, Manager, Seattle Airway Facilities Sector, sent a memorandum to all sector employees, to advise them of the possibility of moves and job security. It also advised the employees of relocations that had taken place in both Sector Field Offices and Sector Headquarters Offices. See GC 15.

27a. On September 28, 1983, Mr. Johannssen, having learned of the Burrell and Macdonald transfers from Mr. Burrell, called Mr. Issac to renew his demand to bargain over the relocations and changes, and to advise him that PASS would seek a temporary restraining order if he continued to move people. See TR 50-52.

b. After speaking with Mr. Issac, Mr. Johannssen called FAA's Director of Labor Relations, Edward Curran, and renewed his demand to bargain on the reorganization in the NW Region. See TR 52-53.

28a. On November 23, 1983, a temporary injunction was issued by a Judge of the United States District Court for the Western District of Washington. It orders that:

> Federal Aviation Administration, Washington, D.C., its management officials, supervisors, representatives, agents, employees, attorneys, and all other persons acting on its behalf are enjoined and restrained from unilaterally changing the terms and conditions of employment of its employees in the Northwest Mountain Region who are represented by Professional Airways Systems Specialists, including, but not limited to, transferring, reassigning, or otherwise directing the movement of employees between different work stations without first giving notice to Professional Airways

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Systems Specialists concerning such changes and without bargaining with Professional Airways Systems Specialists regarding the impact and implementation of such changes.

b. In an affidavit prepared in connection with the District Court proceeding, Mr. Issac represented that five personnel actions were pending in the NW Region as a result of the sector staffing plan and that two employees (N. Jaussi and S. Jones) had declined offers of reassignment after their positions in Malad City, Idaho, were eliminated, and were scheduled to retire on December 31, 1983.

Evidence concerning a status quo ante remedy as applicable to the sector reconfiguration plan.

29a. Eight bargaining-unit employees were affected by the sector reconfiguration plan. Of these, four retired, one resigned, and three were transferred (from Boise to Billings, from Colorado Springs to Denver, and from Spokane to Seattle). See TR 192, 201, 194, 182 and GC 20. FAA recognized that the change was "major," that it involved a "long and difficult process," and that it would involve the sale of residences by relocated employees (GC 18, page 2).

b. If status quo ante relief should be granted, Respondent would face "two options" (TR 181). One would be to reestablish six sector headquarters offices, which have been closed, and fully staff them. The other, "most likely alternative," would be to move the bargaining-unit employees back to the closed offices with, in the opinion of Mr. Issac, "nothing for them to do until we could negotiate a reassignment with the union" (TR 182).

c. According to figures produced by Respondent, it would cost $1,961,985 to reestablish and fully staff the original sector headquarters offices as they were before the reconfiguration was implemented, that is, if the first option were followed. See R 9. This figure breaks down into a one-time cost of $645,000 for moving expenses of 43 persons, or $15,000 per employee, an estimated annual cost of $1,216,985 for salaries for them, and $100,000 for rental of facilities, utilities, and transfer of equipment.

d. The salary cost is shown because Respondent regards the move of the relocated employees back to their old locations as a "total waste" (TR 187), moving personnel where they are not needed and away from locations, where they are needed. Of the 43 persons included in the breakdown, "30, maybe 35" are still in FAA's employ (TR 189). Respondent also counts all 43 because, in Mr. Issac's opinion, it would have "to back fill in behind those people when they were re-employed in these locations" (TR 189).

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e. In preparing these figures, Respondent did not check to see whether, in every case, a move would actually be necessary. See TR 190 and 198-201.

f. Also, the offices involved were not fully staffed at the time of implementation of the plan. The General Counsel, in asking for status quo ante relief, asks only for a return to the status as it existed at the commencement of the reconfiguration. See TR 193.

g. According to other figures estimated by Mr. Issac, it would cost in the range of $250,000 in annual salaries, plus $120,000 or $130,000 in moving expenses, to follow the "most likely" option of just moving the eight bargaining-unit employees back to the closed offices. Of the eight, five might not have to be moved. See TR 202. These figures were admittedly "guess[ed]" at by Mr. Issac (TR 183). The salary cost is included because Respondent regards such use of personnel as a "total waste" (TR 187), and because it would have to staff the desks the employees leave behind, if the bargaining process "stretches on for months" (TR 195). Respondent admits that, overall, the NW Region is overstaffed so that there are plenty of employees to fill positions. See TR 202-203.

Evidence concerning a status quo ante remedy as applicable to the sector staffing plan.

30a. Insofar as bargaining-unit employees are concerned, there have been 11 reassignments and 5 retirements pursuant to the implementation of the staffing plan. See TR 183-184. The estimated one-time cost of moving these employees back to their former locations is $165,000. There would also be an estimated annual recurring cost of $431,344 for salaries. See R 11 and TR 184-185. These figures are based on full staffing at the former locations. However, over a period of time, preceding implementation of the plan, FAA had "intentionally attrited down over a period of time," so that, in "many offices," staffing was down to 3 or 4 employees, whereas they had been staffed with "9, 10, or 12 people, as full offices" (TR 191).

b. The result of such a move would be the placement of personnel where they are not needed and away from offices where they are needed, and which are "likely to be understaffed" (TR 204). This could affect the timeliness of getting facilities back on the air. However, apparently none of the facilities involved are "immediate response" ones, so that a certified technician is not needed "right on duty" (TR 197). Also there is overstaffing, overall, in the NW Region.

Discussion and Conclusions

A. A deposed union (FASTA) cannot waive the statutory right of a successor union (PASS) to bargain on behalf of unit employees who have chosen the successor union as its exclusive representative.

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FAA does not deny its refusal to bargain with PASS, but asserts herein, as it has in numerous other cases involving unilateral changes in working conditions,[3/] that the waiver of the right to negotiate midterm changes contained in the FASTA/FAA contract limits FAA's obligations to PASS to consultation rights only.

It is well established that a waiver of the statutory right to bargain will not be lightly inferred, and will be found only if the exclusive representative clearly and unambiguously waived its bargaining rights. Department of the Air Force, Scott Air Force Base, Illinois ("Scott AFB"), 5 FLRA No. 2, 5 FLRA 9 (1981); Department of the Air Force, U.S. Air Force Academy, 6 FLRA No. 100, 6 FLRA 548 (1981); Library of Congress, 9 FLRA No. 51, 9 FLRA 421, 423 (1982) and 9 FLRA No. 52, 9 FLRA 427, 429 (1982).

In the instant case, the General Counsel does not contend that Articles 47 and 54 of the FASTA agreement do not contain a waiver. However, since the waivers were negotiated by FASTA, the previous exclusive representative, and not by PASS, the General Counsel contends that it may not be applied so as to foreclose the newly certified union from the exercise of its most fundamental statutory right. There is no evidence that PASS ever waived its right to bargain, or has ever elected to consult rather than negotiate changes in working conditions. In fact, the record evidence conclusively demonstrates PASS's repeated insistence on enforcing its statutory right to negotiate over changes in working conditions.

FAA's contention that PASS is bound by FASTA's waiver is grounded upon its interpretation of U.S. Nuclear Regulatory Commission ("NRC"), 6 FLRA No. 9, 6 FLRA 18 (1981), which dealt with a contract clause granting the union the right to use agency bulletin boards. See RBr 7-10. In NRC, the Authority concluded:

> In agreement with the Judge's findings and conclusions, the Authority holds that the clause relating to bulletin boards in the expired agreement created a condition of employment which remains

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[3/] The General Counsel asks that judicial notice be taken of the Motion to Expedite Decisions dated September 27, 1983, and signed by FAA's Director of Labor Relations, the General Counsel, and PASS's counsel. All parties to the motion aver there are 25 unfair labor practice complaints against FAA now pending trial on this issue, with additional charges being filed regularly, if not daily. A copy of the motion is attached to the General Counsel's brief, as Exhibit 1. This motion is judicially noticed.

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> binding in its entirety despite the agreement's expiration and the change of exclusive representative. In the Authority's opinion, the purposes and policies of the Statute are best effectuated by a requirement that existing personnel policies, practices, and matters affecting working conditions continue, to the maximum extent possible, upon the expiration of a negotiated agreement, absent an express agreement to the contrary or unless modified in a manner consistent with the Statute. Such a result fosters stability in Federal labor-management relations, which is an underlying purpose of the Statute. See Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky ["Navy"], 4 FLRA No. 100 [4 FLRA 760] (1980); and Department of the Air Force, 35th Combat Support Group (TAC), George Air Force Base, California ["TAC"], 4 FLRA No. 5 [4 FLRA 22] (1980). We see no distinction in the circumstances of this case where there has been a change in the exclusive representative since the expiration of the agreement. The stability of the new bargaining relationship is enhanced by a required maintenance of existing personnel policies and practices, and matters affecting working conditions pending the negotiation of a new agreement.

See 6 FLRA at 19-20.

The General Counsel and PASS would limit the application of NRC to contract provisions which establish or define existing personnel policies, practices and terms and conditions of employment, but exclude any waiver of a statutory right or matter concerned solely with the statutory relationship between the parties.

In agreement with Administrative Law Judge Garvin Lee Oliver, who has decided the same issue presented here in favor of the General Counsel and PASS,[4/] I find that this distinction makes sense.

[4/] See Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C. ("FAA NW"), OALJ 83-80, Case Nos. 9-CA-20280 and 9-CA-20410, decided April 25, 1983, involving a unilateral change in a holiday staffing policy and practice.

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The desirability of "stability in Federal labor-management relations" spoken of in NRC (6 FLRA at 20), applied to a right gained by contract — the use of agency bulletin boards. It takes a quantum leap to say that it is also desirable, in the name of "stability," to take away the fundamental right, mandated by the Statute, that employees be free to choose the exclusive representative who is to represent them in exercising the statutory right of unions to bargain on behalf of the unit. See Section 7101, that the "public interest" is served by "collective bargaining" on behalf of employees "through labor organizations of their own choosing in decisions that affect them. . . ." Thus, the Statute itself would seem to proscribe a "stability" whereby a repudiated union could impose its will, the waiver of the fundamental right to bargain, upon a newly chosen union.

Such a reading of NRC would also be at odds with Authority precedent holding that contract clauses concerning the bargaining relationship between the parties, unlike clauses relating to working conditions of unit employees, are subordinate to the dictates of the Statute, and therefore cease to bind anyone upon the issuance of a new certification. Thus, the Authority has ruled that once it issues a certification on consolidation of units, the obligation to bargain that formerly existed between a local union and local management ceases, despite contract terms specifically providing for negotiations and despite the rule that requires continuation of the conditions of employment established in the local agreements. See American Federation of Government Employees, Local 1164, 6 FLRA No. 60, 6 FLRA 342, 343-344 (1981); and Department of Health and Human Services, Social Security Administration, 6 FLRA No. 33, 6 FLRA 202 (1981). If contract terms concerning the bargaining obligation of the parties do not survive a certification on consolidation, they certainly cannot be viewed as surviving the certification of a completely new and distinct bargaining agent.

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It should be noted that a contrary conclusion was reached by Administrative Law Judge Salvatore J. Arrigo, in Department of Transportation, Federal Aviation Administration, Los Angeles, California ("FAA LA"), OALJ-83-64, Case No. 8-CA-20260, decided March 11, 1983, involving a unilateral change in work schedules. Judge Arrigo noted that: "[T]here is no indication given in Nuclear Regulatory Commission that the Authority is inclined to approach the matter in a manner whereby the express waiver of a statutory right concerning a union's relationship with an employer would be treated differently from any other contractual term and condition of employment."

Both decisions are pending before the Authority on exceptions. They are the decisions referred to in the Motion to Expedite Decisions alluded to in footnote 3, above.

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This view finds support in cases decided under Executive Order No. 11491, as amended, which controlled labor relations in the Federal sector prior to enactment of the Statute. The Federal Labor Relations Council (predecessor of the Authority) held, in Internal Revenue Service, Ogden Service Center, et al. and Internal Revenue Service, Brookhaven Service Center, 6 FLRC 311 (1978), that the parties were not obligated to maintain all provisions in an expired negotiated agreement. The Council held that, upon expiration of an agreement and absent agreement to the contrary, the agency was not required to maintain provisions relating to "permissive" subjects of bargaining, and the parties were not required to maintain provisions relating to matters outside the scope of bargaining. See 6 FLRC at 319 and 321-322. It was also necessary that the agreement be brought into conformance with changes in laws and regulations. See 6 FLRC at 320 and 322.

And, under the National Labor Relations Act which controls labor relations in the private sector, it is the rule that where a contract is no bar to the conduct of a representational election, then it similarly cannot prevent full collective bargaining by the newly selected representative. In the lead case adopting this principle, American Seating Co., 106 NLRB 250, 32 LRRM 1439 (1953), the employer had argued that the contract negotiated by UAW for its plant-wide unit still controlled a group of employees who had voted for a separate unit to be represented by the Patternmakers. The employer contended that the Patternmakers would not have the right to negotiate a new agreement until expiration of the UAW contract. (The right to negotiate a new agreement is conceded here; and we are concerned only with the waiver by the former representative of the right to negotiate concerning changes not specifically covered by the agreement.) In rejecting the employer's arguments, the Board stated its rationale in terms equally applicable to the instant situation:

> Although the certification of October 6, 1952, gave the Pattern Makers immediate status as exclusive representative "in respect to rates of pay, wages, and hours of employment," the Respondent would qualify the Pattern Makers' authority as to these subjects by adding, "after July 1, 1953." If the Respondent's contention is sound, a certified bargaining representative might be deprived of effective statutory power as to the most important subjects of collective bargaining for an unlimited number of years as the result of an agreement negotiated by an unwanted and repudiated bargaining representative. There is no provision in the statute for this kind of emasculated certified bargaining representative.

Id., 106 NLRB at 255. Additionally, the Board noted that the National Labor Relations Act provides employees dissatisfied with their present

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bargaining representative the opportunity to select a new representative through a Board conducted election. The Board said that this policy would be defeated entirely by saddling the new bargaining representative with the contractual errors of its predecessor:

> * * * if a newly chosen representative is to be hobbled in the way proposed by the Respondent, a great part of the benefit to be derived from the no-bar rule will be dissipated. There is little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period of time.

Id.

The record here indicates just how long PASS could be "hobbled" by FASTA's contractual waiver of bargaining rights. Bargaining on a FAA/PASS contract began in May 1982. The last negotiating session was held in September 1982. Sixty-five negotiability appeals have resulted thus far, with FAA taking the position that just about everything was nonnegotiable. Only two articles have been agreed upon, and then only after a week's work, with the assistance of a representative from the Federal Mediation and Conciliation Service. See finding 14, above.

While this bargaining process thus slowly struggles towards a new collective bargaining agreement, FAA argues that it remains free to institute "major" changes (finding 29a), unfettered by any obligation to bargain with the chosen representative of its employees, PASS. It is little wonder that FAA thus clings to the terms agreed to by it with the representative repudiated by its employees. In view of FAA's 80's Maintenance Program, calling for sweeping changes, including those here made and more to come, proceeding under terms of the FASTA agreement gives FAA an advantage it is not likely to concede by any quick agreement on a collective bargaining agreement with PASS. When the Authority ruled, in NRC, that "stability" is desirable, it could hardly have foreseen that FAA, in the name of "stability," would deny its employees the right of effective representation in this manner.5/

5/ FAA contends that this Authority's decision in NRC justifies such a result because it gave up something in return for FASTA's waiver of the right to bargain. See RBr 10. This record does not indicate what FAA gave up. However, the findings in the two previous administrative law judge decisions, involving this same FASTA/FAA contract, indicate that what FAA gave up was an immediate agreement authorizing dues checkoff for FASTA. See FAA NW, page 4 of OALJ-83-80 and FAA LA, page 10

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The intent of NRC seems to be to preserve collective bargaining, by requiring an agency to maintain existing conditions of employment during a period of negotiation, by insuring that any changes are negotiated, and not unilaterally imposed. To so apply this rationale to deprive a newly certified union of that very right creates an anomaly which should be eschewed. The only right secured, in NRC, was a contract one -- use of agency bulletin boards. Thus the holding did not grant the union a right to which it was otherwise entitled by law. In contrast, upon certification, PASS acquired the statutory right to bargain, which it clearly has not waived. Included in this right is the right to insist upon negotiations prior to the implementation of changes in conditions of employment. (Scott AFB, 5 FLRA at 10-11), which PASS has repeatedly done. FAA would force PASS to negotiate an agreement to gain the right to negotiate. This is surely not the situation Congress intended when it mandated that, upon certification, agencies must bargain collectively with the representative chosen by their employees.

No case has been cited by FAA which holds that one party may waive the statutory rights of another. Indeed, to so hold would be contrary to hornbook law. See 28 Am. Jur. 2d. "Estoppel and Waiver," § 155 at 837-838 (1966). It would also be contrary to the Supreme Court's admonishment that an exclusive representative's attempted waiver of statutory rights will be condonned only "[p]rovided the selection of the bargaining representative remains free." Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 280 (1956, emphasis by the Court). Here, FAA would allow a repudiated union to waive a statutory right of a freely-elected successor union -- an election which may have turned upon the fact that the repudiated union waived the statutory right to bargain in return for a dues checkoff agreement that benefitted FASTA institutionally, but did nothing to enhance the working conditions of the unit employees. See footnote 5, above. Employees can hardly be said to be "free" to elect a new representative if, for an indefinite period, they remain tied to waivers granted by the representative they rejected.

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of OALJ-83-64. Assuming, then, that this is what FAA gave up, it is noted that dues withholding was not a statutory right at the time the FASTA/FAA agreement was reached, in 1977. Upon enactment of the Statute, in 1978, dues withholding became a right bestowed by statute. See 5 U.S.C. 7115. Thus, FAA gave up nothing in return for binding PASS to a waiver of bargaining rights, in 1983, that was agreed to by FASTA, in 1977.

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By refusing to negotiate with PASS over its step-by-step implementation of its 80's Maintenance Program in the NW Region, FAA committed an unfair labor practice, in violation of Sections 7116(a)(1) and (5) of the Statute.

B. Similarly, a deposed union may not, by contract, fix upon its successor the union representatives authorized to deal with management.

As a corollary to its waiver-of-right-to-bargain defense, Respondent also argues that it fulfilled its obligation to notify PASS of proposed changes by notifying regional representatives of PASS, as provided for in the FASTA/FAA agreement. See RBr 10-11 and 16. FAA takes this position in spite of the fact that PASS's president repeatedly informed FAA that he was the sole union representative designated to receive such notices.

This Authority has repeatedly held that the parties have the statutory right to designate representatives of their own choosing. American Federation of Government Employees, AFL-CIO, 4 FLRA No. 39, 4 FLRA 272, 274 (1980); Philadelphia Naval Shipyard, 4 FLRA No. 38, 4 FLRA 255 at 269 (1980); Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia, 11 FLRA No. 78, 11 FLRA 419 at 429 (1983). For reasons discussed above in connection with the bargaining waiver issue, FAA/PASS cannot be found to have waived its right to designate its own representatives.

Under the circumstances, Respondent's failure and refusal to provide notice to the Union's designated representative must be found to constitute an unfair labor practice in violation of Sections 7116(a)(1) and (5) of the Statute.

C. The scope of the complaint is broad enough to cover all steps in FAA's 80's Maintenance Program in the NW Region.

Respondent's brief reiterates the position taken at the hearing that the complaint "is insufficient to allow consideration of the field office reorganization in the proceeding." See page 11 of its unnumbered brief. This position was rejected at the hearing (see TR 166-167) and, upon reconsideration, is rejected again.

The facts show that FAA's NW Region, since on or about April 22, 1983, has decided upon and begun implementation of FAA's Airway Facilities 80's Maintenance Program, whose purpose is to reconfigure and reorganize airway facilities by consolidating existing work centers. See findings 8, 18a and d, and 23c, above. FAA has done so in two steps. The first involves reconfiguration of the sector headquarters' offices. This is the change which Respondent believes is covered by the complaint. The second, implementation of which began in July 1983, involves staffing in the sector field offices -- the changes pursuant to which Respondent argues are not covered by the complaint.

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The unfair labor practice charge, upon which the complaint in this proceeding is based, was served upon FAA several days prior to the July 1983 phase of the reorganization begun in the NW Region to meet FAA's 80's Maintenance Program. It alleges that since on or about April 22, 1983, the NW Region has begun, and "continuing to date," has implemented "a reorganization" which "has resulted" or "will result" in changed conditions of employment for bargaining-unit employees. See finding 22, above. The charge is thus broad enough to cover the changes in both the headquarters and field offices.

The complaint names the reorganization involved in the following language:

> On or about April 22, 1983, Respondent decided to reorganize the National Airspace System (NAS) Airway Facilities Sectors in Respondent's Northwest Mountain Region by, inter alia, reducing the number of Sector Headquarters within said Region from eleven to five.

See paragraph 7(a) of GC 1(d).

Paragraph 7 of the complaint, up to the words "inter alia," clearly is broad enough to cover both the headquarters and the field office phase of the reorganization in the NW Region, which is designed to meet the overall requirements of FAA's 80's Maintenance Program. All the unit employees covered by the changes in both type offices work in "Airway Facilities Sectors" in the "Northwest Mountain Region." See finding 18d, above.

The complaint's use of "inter alia," in the paragraph describing the reorganization involved in this proceeding, is not a limiting one. It serves merely to give an example, and uses the first phase of the reorganization for this purpose.

To the extent that the complaint may have misled Respondent, no harm has been done, because an offer was made at the hearing to continue the hearing, if necessary, in order that Respondent not be prejudiced. No such continuance was requested. See TR 144A. And the issue of the field office staffing changes was fully litigated, at the hearing. Cf. footnote 1 to NRC, 6 FLRA No. 9, 6 FLRA 18 (1981), where the Authority so commented, in affirming the denial of a motion filed by the respondent, in that case, on the ground that it did not receive notice of all issues of law and fact.

D. The status quo ante remedy is appropriate.

In addition to the usual request for a cease and desist order and a posting of a notice to employees, the General Counsel requests that Respondent be ordered to:

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> . . . rescind the changes which have resulted from its unlawful unilateral implementation of the sector reorganization and to restore the conditions existing prior thereto until such time as Respondent fulfills its statutory obligations to the Union[10/].

See GCBr 17.[6/] At the hearing, counsel for the General Counsel explained that the requested relief applied to conditions as they existed just before the changes, that is when the offices were no longer fully staffed, in anticipation of the changes to be implemented. See TR 193 and finding 30a, above.

The Union concurs with the request for a status quo ante remedy, and suggests that "employees be given the option of returning or not returning to their former jobs, in recognition of the possibility that some would not want to return to their old jobs, particularly since the return might be temporary only, pending the outcome of negotiations. See CPBr 14.

Respondent argues that a status quo ante remedy would have a "substantial impact on the agency's operations," "not promote the efficiency of the agency" (RBr 17), and "might well have an actual impact on the maintenance of the facilities (RBr 18).

Respondent also argues that such a remedy would be inappropriate because it did inform PASS of its plans and offered it the opportunity to consult regarding them, under its "well founded" belief that it was following the law (RBr 16). As to this point, it is clear that Respondent's offers to consult, where accepted, have been turned against the Union. See FAA NW, OALJ-83-80 at page 18, where FAA argued "that it met any obligation to bargain in good faith . . . notwithstanding that it described its conduct as 'consultation'." FAA took the same position in FAA LA, OALJ-83-64. at page 8. In view of this practice, one can hardly give FAA any credit for offering to consult, an offer which carries none of the privileges of negotiation, such as taking impasses to the Federal Services Impasses Panel. See Section 7119 of the Statute.

[6/] In footnote 10, the General Counsel suggests the following alternative:

> . . . if appropriate, the instant order may provide that all employees remain in place during the pendency of the collective bargaining negotiations but that any agreement reached be retroactively applied. Such an order must be understood to require that should new selection procedures be negotiated, employees who would not then be selected for transfer, be restored to their former positions.

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All parties agree that this Authority's decision in Federal Correctional Institution, 8 FLRA No. 111, 8 FLRA 604 (1982) sets the five guidelines to be followed in determining the appropriateness of status quo ante relief, as follows:

1. Whether and when the union was notified of the change.

2. Whether and when the union demanded negotiations.

3. The willfulness of the agency's refusal to bargain.

4. The nature and extent of the impact of the change upon employees.

5. The degree of disruption or impairment upon the efficiency and effectiveness of the agency's operations, should the status quo remedy be imposed.

As to the first guideline, FAA acted in knowing defiance of PASS's request that notice be given to Mr. Johannssen, its President, and instead notified regional representatives who held no authority to bargain or receive notice of the changes proposed. Since a union acts only through authorized representatives, notice to unauthorized ones does not suffice, in the view of the Authority. See Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia, 11 FLRA No. 78, 11 FLRA 419-420 and 429 (1983).

As to the second guideline, despite FAA's refusal to give notice to PASS's designated representative (its President, Mr. Johannssen), Mr. Johannssen repeatedly demanded bargaining over the changes at issue -- when he first heard rumors about them; when FAA confirmed the rumors; when FAA announced steps being taken to implement the changes; and when he first learned that employees were actually being transferred pursuant to implementation of the changes.

Third, the FAA's refusal to bargain over the changes in the NW Region was deliberate and in keeping with its national policy. The fact that this refusal is based on a mistaken legal position does not detract from the deliberateness of FAA's conduct. A party's mistake of law does not render deliberate conduct any less willful. In short, the FAA had a choice -- it could bargain (and could do so even if it believed it was not required to do so), or it could refuse to bargain. It willfully chose the latter course, one greatly to its advantage, and, therefore, faces the consequences of its decision.

Fourth, the impact of the change was severe. A number of employees have been forced to relocate by hundreds of miles. Such relocations have involved the trauma of selling homes and uprooting families. Some employees have retired or resigned rather than face relocation.

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Fifth, and last, the record does not demonstrate an excessive degree of disruption for FAA's NW Region. Since November 23, 1983, FAA's plans for further implementation of its 80's Maintenance Program have been on hold, under the court injunction. Prior thereto, only 24 employees had been affected. See findings 29a and 30a. While a return of them to their former duty stations might result in an imbalance in workload, creating a temporary need at their current duty stations, FAA can draw upon its excess of personnel in the NW Region to fill this gap while the bargaining process is completed. Since none of the relocated employees were shown to be serving at facilities where an "immediate response" is required (finding 30b), the fear of FAA, that imposition of this remedy might have an impact on the maintenance of facilities, does not appear to be well founded. Furthermore, adoption of the Union's suggestion, to return relocated employees to their former duty station only at their option, may result in few exercising this option, perhaps only those who have been unable to sell their homes and move their families. After all, the return to the former duty station may only be temporary, pending the outcome of the negotiations -- hardly an enticement to most employees to take up the option of another relocation. Similarly, retired employees may not be tempted by an offer to leave retirement for what could be only a temporary period.

Much of the evidence offered by Respondent, as to the disruption or impairment upon the agency's efficiency and effectiveness, consisted of cost estimations of any status quo ante remedy. Dollar cost, per se, however, does not appear to be what the Authority had in mind in articulating its fifth guideline. And, in any event, Respondent's estimations seem grossly inflated. They are based on fully staffed offices, which was not the situation at the time the changes here involved were implemented. See finding 30a, above. They are based on a relocation cost of $15,000, per employee, without regard as to how many would actually have to be moved. Some may not have yet sold their homes or relocated their families, for example, Mr. Burrell and Mr. Macdonald. See findings 24b and 25b, above. Those affected employees who took retirement rather than face relocation would probably not have moved. Also, a major cost element in Respondent's projections is salaries for current employees; and yet their salaries will be paid whether or not a status quo ante remedy is ordered.

Thus, each of the five guidelines of Federal Correctional Institution cuts in favor of imposing the status quo ante remedy sought. While there will be some costs and a measure of inefficiency and ineffectiveness resulting from its imposition, these results are moderate when compared to the adverse impact suffered by the the affected employees from Respondent's refusal to bargain with their chosen representation over the impact and implementation of FAA's 80's Maintenance Program in the NW Region. Accordingly, status quo ante relief will be ordered, with acceptance of the Union's suggestion that any relocation be at the option of the employee. Optional relocation will obviate any distress to

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employees who may have come to prefer their new duty station, or prefer not to endure another, and perhaps temporary, relocation.

E. A nationwide cease-and-desist and posting order is appropriate.

1. The General Counsel and the Charging Party join in requesting the issuance of a broad cease and desist order, prohibiting FAA from changing working conditions without first notifying PASS and providing it an opportunity to bargain concerning the proposed changes. See CPBr 23-24 and Attachment A to GCBr. As for the posting of an order to employees notifying them of the relief granted herein, the General Counsel asks only that it be posted in FAA facilities in its "Northwest Mountain Region." See attachment A to the brief of the General Counsel. The Charging Party proposes a notice, but does not make a request as to the geographic area of the posting. Based upon the record made in this proceeding a broad cease-and-desist and posting order is deemed to be appropriate.

The evidence shows that the changes made, in this case, were made pursuant to a nationwide plan which is applicable to all FAA airway facilities and which will effect changes in working conditions at these facilities throughout the 1980's. See finding 8, above.

The evidence shows that it is also a nationwide policy of FAA to adhere to the terms of its expired contract with FASTA, and to refuse to bargain with the successor union, PASS, over the changes mandated in this plan, or to notify the authorized representative of PASS of these changes. This policy had generated some 200 refusals to bargain, as of the time of the hearing. Charges of unfair labor practice charges are being filed regularly, if not daily, according to the parties. See footnote 3, above.

Ordinarily, it may be fair and reasonable to assume that a Federal agency will follow, throughout its facilities, a principle of law established at one. This Authority has so assumed as to labor organizations. See, e.g., National Treasury Employees Union, 10 FLRA No. 91, 10 FLRA 519 at 522 (1982) where the union was testing a nationwide policy of not furnishing attorneys to nonmembers, at the U.S. Customs Service and the Nuclear Regulatory Commission. In that case the Authority ordered the posting only at the facilities of those two agencies, and not at all exclusive units represented by the union. Even in that case, however, the Authority did not limit the posting to only those facilities where the policy was actually implemented. See 7 FLRA at 522, 532 and 537. And, in dealing with an agency which had committed an unfair labor practice, the Authority modified an order recommended by an administrative law judge, and ordered a posting at all facilities of an agency where the union was the exclusive representative, even though the violative act occurred as to an employee employed at only one. See United States Forces Korea/Eighth United States Army, 11 FLRA No. 79, 11 FLRA 434, at 437, 441 and 453 (1983). The particular circumstances

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justifying this broad posting order was that the employee found to have been discriminated against because of union activity was the union president and, as such, "represent[ed] employees at several of Respondent's facilities through Korea" (11 FLRA at 437).

Here, we have a union representing employees at facilities throughout the United States and being held hostage to a nationwide policy of the agency that is applicable to each facility, and denies to the union its statutory right to bargain and designate its own representatives to deal with management. Here, we also have the agency's Director of Labor Relations issuing an intimidating letter to the union president when, shortly after certification of the union as the exclusive representative of a nationwide unit, the union President asserted the union's statutory right to bargain on behalf of the unit. The Director's January 21, 1982, letter to the union President stated that FAA ". . . would not be influenced by threats and demands of labor organizations" and that "rhetoric such as that contained in your January 8 letter has previously worked to the extreme detriment of another union formerly representing FAA employees." See finding 9, above. This was clearly a reference to PATCO, whose exclusive representative status was revoked by the Authority on October 22, 1981. See Professional Air Traffic Controllers Organization, Affiliated with MEBA, AFL-CIO and Federal Aviation Administration, Department of Transportation ("PATCO"), 7 FLRA No. 10, 7 FLRA 34 (1981). In addition, PATCO and/or its striking members suffered criminal and civil contempt citations and dismissals from the Federal service.7/

There is nothing in this record to justify such a taunt to a newly-certified union whose President was only asserting statutory rights. It seems calculated to have a coercive effect upon the union's President and restrain him in the exercise of statutory rights.8/ It suggests a mind-set at FAA's highest levels to keep unions from becoming aggressive in seeking their rights. Accordingly, a cease-and-desist and posting order will be recommended that is applicable to all FAA airway facilities where unit employees work, so that all unit employees are protected and know that this Authority will protect them when exercising

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7/ The background and results of this dispute between FAA and one of its union is outlined in PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 551-552 (CADC, 6/11/82).

8/ Superficially, at least, such agency conduct seems to quality as an unfair labor practice, in violation of Section 7116(a)(1) of the Statute. While the complaint alleges a violation of this section, neither it nor the charge filed by the Union indicates that this conduct was put in issue. Accordingly, the Director's letter is considered herein only in connection with the appropriate remedy to be ordered.

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legitimate rights, and not restrict aggressive leadership attempting to secure them, as long as they and their leadership act within the framework of the Statute, for example no striking in the manner of PATCO and its members. Cf. PATCO where it was held that the posting notice "should be given the widest circulation, in order to ensure, to the maximum extent possible, that all those affected should be sufficiently informed" (7 FLRA at 62). In PATCO, the notice to employees was that the exclusive recognition status of their chosen representative had been revoked. Such a broad order is equally appropriate here, where the notice will be to employees that their chosen representative must be accorded its full statutory rights, including the right to bargain and designate officials to deal with management.

Ultimate Findings and Order

It has been shown, by the preponderance of the evidence,[9/] that Respondent committed and is committing the alleged unfair labor practices, and thus violated and is violating Sections 7116(a)(1) and (5) of the Statute.

Accordingly, and pursuant to Section 7118 of the Statute and 5 CFR 2423.29, it is hereby ordered that the Federal Aviation Administration, Washington, D.C. shall:

1. Cease and desist from:

(a) Implementing changes in the working conditions of employees exclusively represented by the Professional Airways Systems Specialists (PASS), such as Northwest Mountain Region general NAS sector reorganization, without providing prior notice to its designated representative and affording it the opportunity to negotiate regarding the impact and implementation of the changes.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the implementation of the Northwest Mountain Region general NAS sector reorganization,

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9/ The statutory burden of proof. See 5 U.S.C. 7118(a)(7).

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including the sector reconfiguration and the sector operations staffing plan, and restore all conditions of employment affecting bargaining unit employees which were in effect immediately prior to such changes, including offering to relocated and former employees the option of returning as employees to their former duty stations.

(b) Notify PASS' designated representative, Howard Johannssen, of any intention to reimplement the general NAS sector reorganization and, upon request, negotiate regarding the impact and implementation of the change prior to implementation thereof.

(c) Post at its facilities copies of the Notice, attached hereto as Appendix B, on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Administrator of the Federal Aviation Administration and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(d) Pursuant to 5 CFR § 2423.30 notify the Regional Director, Region IX, Federal Labor Relations Authority, San Francisco, California, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: January 30, 1984
Washington, DC

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APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE PURPOSES AND POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes in the working conditions of employees exclusively represented by the Professional Airways Systems Specialists (PASS), such as the Northwest Mountain Region general NAS sector reorganization, without providing prior notice to its designated representative and affording it the opportunity to negotiate regarding the impact and implementation of the changes.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the implementation of the Northwest Mountain Region general NAS sector reorganization, including the sector reconfiguration and the sector operations staffing plan, and restore all conditions of employment affecting bargaining unit employees which were in effect immediately prior to such changes, including offering to relocated and former employees the option of returning as employees to their former duty stations.

WE WILL notify the PASS' designated representative, Howard Johannssen, of any intention to reimplement the general NAS sector reorganization and, upon request, negotiate regarding the impact and implementation of the change prior to implementation thereof.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IX, whose address is: 530 Bush Street, Suite 542, San Francisco, CA 94108, and whose telephone number is: (415) 556-8105.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SAN ANTONIO AIR LOGISTICS CENTER
KELLY AIR FORCE BASE, TEXAS

Activity

and

Case No. 0-AR-935

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1617

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Barry J. Baroni filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated January 20, 1985, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1/] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2/] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority not later than the close of business on February 25, 1985. However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until March 4, 1985.

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

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In its exception dated February 26, 1985, the Union states that it "hereby files an exception to the Award ..., issue[d] on 20 January 1985 and received on 28 January 1985." Inasmuch as the period for filing exceptions to the Arbitrator's award began on the date the award was served on the filing party, that is, deposited in the mail (see section 2429.27(d) of the Authority's Rules and Regulations), and not on the date the award was received by that party, the Union's exceptions were untimely filed.

Accordingly, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 11, 1985

Harold D. Kessler,
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY MISSILE COMMAND; U.S. ARMY TEST, MEASUREMENT AND DIAGNOSTIC EQUIPMENT SUPPORT GROUP, REDSTONE ARSENAL, ALABAMA

Activity/Petitioner

and

Case No. 4-CU-30013

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858, AFL-CIO

Labor Organization

U.S. ARMY MISSILE COMMAND; U.S. ARMY COMMUNICATIONS COMMAND AGENCY - REDSTONE ARSENAL, ALABAMA; U.S. ARMY COMMISSARY; U.S. ARMY TEST, MEASUREMENT AND DIAGNOSTIC EQUIPMENT SUPPORT GROUP, REDSTONE ARSENAL, ALABAMA

Activity/Petitioner

and

Case No. 4-CU-30014

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858, AFL-CIO

Labor Organization

DECISION AND ORDER
AMENDING CERTIFICATIONS AND CLARIFYING UNITS

Upon petitions duly filed with the Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute (the Statute), a hearing was held before a hearing officer of the Authority. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon careful consideration of the entire record, including the contentions of the parties, the Authority finds:

On May 8, 1967, the American Federation of Government Employees, Local 1858, AFL-CIO (Local 1858) was recognized as the exclusive representative for a unit of all nonprofessional employees of the United States Army Missile Command (MICOM). This recognition was amended on June 26, 1975, to add the name of the U.S. Army Communications Command

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(USACOM) Agency - Redstone Arsenal, Alabama (herein MICOM/USACOM). On September 28, 1976, Local 1858 was certified as the exclusive representative for a unit of all professional employees of MICOM.*/ On May 6, 1983, Local 1858 was certified as the exclusive representative for a unit of all professional and nonprofessional employees of the Patriot Project Office, Air Defense Missile System (herein Patriot Project Office).

In Case No. 4-CU-30013, the Petitioner seeks, first, to amend the Activity's name in the MICOM unit of professional employees by adding USATMDE, in order to reflect partly what has always been true, and to reflect changes that have taken place by reorganization. In Case No. 4-CU-30014, the Petitioner seeks to amend the name of the MICOM/USACOM unit of nonprofessional employees by adding the U.S. Army Commissary (herein Commissary) and USATMDE, in order to reflect changes that have taken place by reorganization. Local 1858 does not object to the amendments of the names of the Activities, as requested by the Petitioner.

Due to an organizational restructuring, on February 1, 1976, the Commissary, formerly under MICOM Command, became an element of the U.S. Army Troop Support Agency. In a reorganization on July 11, 1982, the USATMDE was transferred from the MICOM Command to the U.S. Army Materiel Development and Readiness Command (DARCOM). Prior to these reorganizations, the professional employees of the USATMDE were members of the MICOM professional unit, and the nonprofessional employees of the Commissary and the USATMDE were members of the MICOM/USACOM nonprofessional unit. The reorganizations did not change the existing bargaining relationships for the professional or nonprofessional USATMDE employees or the nonprofessional Commissary employees. The Commanders of the Commissary and the USATMDE have remained signatories to the MICOM professional, and the MICOM/USACOM nonprofessional, collective bargaining agreements.

In view of these facts, noting that the changes requested are in order to reflect what is now an accurate identification of the Activities in both of these bargaining units, and that the Union does not object thereto, the requests are hereby granted. Accordingly, the Authority shall order that the certification of the MICOM professional unit be amended to include the name USATMDE, and that the certification of the MICOM/USACOM nonprofessional unit be amended to include the names of the USATMDE and the Commissary.

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*/ The parties are in agreement that this unit included all professional employees of the U.S. Army Test, Measurement and Diagnostic Equipment Support Group (USATMDE), although USATMDE does not appear by name in the certification.

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In Case No. 4-CU-30013, the Petitioner, in addition to the name change granted above, seeks to clarify the MICOM professional unit to reflect the accretion of the professional employees of the Patriot Project Office, who have been part of Local 1858's certified mixed unit of professional and nonprofessional employees, into the MICOM professional unit. In Case No. 4-CU-30014, the Petitioner, in addition to the name change granted above, seeks to clarify the MICOM/USACOM nonprofessional unit to reflect the accretion of the nonprofessional employees of the Patriot Project Office, who have been part of Local 1858's certified mixed unit of professional and nonprofessional employees, into the MICOM/USACOM nonprofessional unit. Local 1858 opposes these requested changes, arguing only that, as the professional employees voted for inclusion with the nonprofessional employees, the Patriot Project Office mixed unit should remain intact.

As noted above, Local 1858 was certifed on May 6, 1983, as the exclusive bargaining representative of all professional and nonprofessional employees of the Patriot Project Office. On June 20, 1983, the Patriot Project Office was transferred from DARCOM to MICOM. No collective bargaining agreement had yet been negotiated when this reorganization took place. As a result of the transfer, the MICOM personnel office, on July 26, 1983, informed Local 1858 that it would consider the provisions of the MICOM professional unit's collective bargaining agreement applicable thereafter to the professional employees of the Patriot Project Office, and the provisions of the MICOM/USACOM nonprofessional unit's collective bargaining agreement applicable thereafter to the nonprofessional employees of the Patriot Project Office.

Prior to the transfer to MICOM, Patriot Project Office personnel records were maintained at the MICOM personnel office and the MICOM personnel office furnished all personnel support and services for the Patriot Project Office pursuant to a service agreement with the Patriot Project Office Commander. Eligibility for vacancies in the Patriot Project Office were MICOM-wide. Subsequent to the transfer, except that the service agreement was abandoned as unnecessary, all personnel services remained the same, and eligibility for job vacancies continued to be MICOM-wide. The record also shows that the employees in the Patriot Project Office and the other MICOM project offices had and continue to share similar job classifications, duties and skills. There was no physical movement of employees, or changes in job classifications or duties, in any of the offices as a result of the transfer of the Patriot Project Office's function to MICOM. So far as the record shows, there has been only one grievance filed by an employee of the Patriot Project Office since the transfer; it was filed and processed under the MICOM professional agreement, without objection from Local 1858.

The Authority notes particularly that the professional employees of the Patriot Project Office share similar job classifications, duties and skills with the professional employees in the MICOM unit; likewise, the nonprofessional employees in the Patriot Project Office share similar job

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classifications, duties and skills with the nonprofesssional employees in the MICOM/USACOM unit. The Authority also notes that eligibility for job vacancies among the professional or nonprofessional employees, respectively, have been and continue to be MICOM-wide; that personnel services are uniformly shared; and that the only reason for the separation of the Patriot Project Office employees from the MICOM bargaining units prior to reorganization would appear to have been that such employees were under separate DARCOM Command. Furthermore, the Authority notes that Local 1858 has been and continues to be the exclusive representative of all employees involved. In view of the above, the Authority shall grant the requested clarification of the MICOM unit of professional employees to include the professional employees in the Patriot Project Office, and the Authority shall also grant the requested clarification of the MICOM/USACOM unit of nonprofessional employees to include the nonprofessional employees in the Patriot Project Office, as all such employees share respective communities of interest, and as such units, as clarified, will promote effective dealings and efficiency of agency operations. Department of the Navy, Naval Hospital, Submarine Base Bangor Clinic, Bremerton, Washington, 15 FLRA No. 23 (1984).

Accordingly, the Authority shall order that the MICOM professional unit be clarified by including the professional employees of the Patriot Project Office, and that the MICOM/USACOM nonprofessional unit be clarified by including the nonprofessional employees of the Patriot Project Office.

ORDER

IT IS HEREBY ORDERED, in Case No. 4-CU-30013, that the unit of all professional employees of the U.S. Army Missile Command, located in Huntsville, Alabama, for which the American Federation of Government Employees, Local 1858, AFL-CIO, was certified as the exclusive bargaining representative on September 28, 1976, be, and it hereby is, clarified to include in said unit all eligible professional employees of the Patriot Project Office previously under the U.S. Army Materiel Development and Readiness Command, and who are now under the U.S. Army Missile Command.

IT IS HEREBY FURTHER ORDERED, in Case No. 4-CU-30013, that the certification of the bargaining unit of all professional employees be, and it hereby is, amended to reflect the change of the Activity's name from U.S. Army Missile Command to U.S. Army Missile Command; U.S. Army Test, Measurement and Diagnostic Equipment Support Group, Redstone Arsenal, Alabama.

IT IS HEREBY ORDERED, in Case No. 4-CU-30014, that the unit of all nonprofessional employees of the U.S Army Missile Command, located in Huntsville, Alabama, for which the American Federation of Government Employees, Local 1858, AFL-CIO, was recognized as the exclusive bargaining representative on May 8, 1967, as amended on June 27, 1975, to

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include the U.S Army Communications Command Agency - Redstone Arsenal, Alabama, be, and it hereby is, clarified to include in said unit all eligible nonprofessional employees of the Patriot Project Office previously under the U.S. Army Materiel Development and Readiness Command, and who are now under the U.S. Army Missile Command.

IT IS HEREBY FURTHERED ORDERED, in Case No. 4-CU-30014, that the certification of the bargaining unit of all nonprofessional employees be, and it hereby is, amended to reflect the change of the Activity's name from U.S. Army Missile Command, U.S. Army Communications Command Agency Redstone Arsenal, Alabama to U.S. Army Missile Command; U.S. Army Communications Command Agency - Redstone Arsenal, Alabama; U.S. Army Commissary; U.S. Army Test, Measurement and Diagnostic Equipment Support Group, Redstone Arsenal, Alabama.

Issued, Washington, D.C., March 11, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SMALL BUSINESS ADMINISTRATION

Activity

and

Case No. 3-CU-30033

NATIONAL OFFICE, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed with the Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute (the Statute), a hearing was held before a hearing officer of the Authority. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon careful consideration of the entire record, including the parties' contentions, the Authority finds: The National Office, American Federation of Government Employees, AFL-CIO (AFGE), was certified as the exclusive representative of a nationwide consolidated unit of professional and nonprofessional employees of the Small Business Administration (SBA). Essentially, the petition seeks to clarify the bargaining unit status of seven employees based on the Activity's contention that they are either supervisors or management officials and should be excluded from the unit.1/

1/ The petition initially sought to include the incumbents of 264 positions in AFGE's national consolidated unit. However, as a result of meetings between the parties, at the time the hearing opened, only 16 positions remained in dispute. During the course of the hearing, the parties stipulated that three employees were not supervisors and should be included in the unit. The parties further agreed that six other employees should be removed from consideration herein. The Authority deems such stipulations to be motions to amend the petition which are hereby granted.

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SUPERVISORS

The Activity contends that the following employees are supervisors within the meaning of section 7103(a)(10) of the Statute,[2/] and should be excluded from the unit: Raymond D. Marchakitus, Supervisory Economist, GM-0110-15; Alice K. Cullen, Economist, GM-0110-14; John P. Hightower, Computer System Analyst, GM-0334-13; and Robert E. L. Gregg, Computer System Analyst, GM-0334-13. Of these, the record establishes that Cullen, Marchakitus and Gregg assign and direct work; and that Hightower assigns and directs work and has effectively recommended subordinates for awards. The Authority further finds that the above duties are not merely routine or clerical in nature, but require the consistent exercise of independent judgment. Accordingly, the employees listed above are supervisors under the meaning of section 7103(a)(10) of the Statute and should be excluded from the unit.

MANAGEMENT OFFICIALS

The Activity further contends that the following employees are management officials within the meaning of section 7103(a)(11) of the Statute[3/] and must be excluded from the unit: Maureen Glebes, Economist, GS-0110-14; Robert F. Clairmont, Assistant Advocate, GS-0301-14; and Gerald T. Lawson, Assistant Advocate, GS-0301-14. In the lead case of Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981), the Authority interpreted the statutory definition of "management official" to include those individuals who: (1) create, establish or prescribe general principles, plans, or courses

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2/ Section 7103(a)(10) defines a "supervisor" as:

> . . . an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment[.]

3/ Section 7103(a)(11) defines a "management official" as:

> . . . an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency[.]

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of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency. Applying these criteria to the instant case, the Authority finds that the above employees are highly trained resource persons whose actions assist in implementing, as opposed to shaping, the Activity's policies. Thus, the record establishes that Glebes is primarily involved with studying economic trends of legislation and regulation to determine the impact on small businesses. She reports these findings to the policy staff and makes recommendations as to what these trends are and why they should be looking at them. Her major function is to give people who are in a policy making position in both the SBA and other government agencies some idea of what the state of small business is and what industries will be affected and how they will be affected by action that may be taken by government agencies. Further, the record establishes that Clairmont and Lawson are primarily troubleshooters who, within their own program responsibilities, look into policies and activities of Federal agencies which have the potential or do in fact have an adverse impact upon small businesses. They operate under the guidelines of Public Law 94-305 which was passed to aid, counsel, assist and protect the small business community. They work closely with other Federal agencies in an attempt to influence their policies to aid small businesses or refrain from injuring them. They also recommend SBA hearings to study certain problems caused by actions of other government agencies. While they may influence policy of other government agencies in the course of their work, they do not influence the policies of their own employing agency.4/ Within their own agency, they only have the authority to recommend action which in turn is evaluated through numerous levels of review. It follows that these employees are not management officials in that they do not exercise duties and responsibilities which require or authorize them to formulate, determine or influence the policies of the Agency within the meaning of section 7103(a)(11). Accordingly, the Authority finds that these employees should be included in the bargaining unit.

4/ Cf. Office of Personnel Management, 5 FLRA 238, 246-247 (1981) (wherein the Authority held that employees who are not engaged in performing "internal" personnel work relating directly to the personnel operations of their own employing agency, and therefore would not be faced with a conflict of interest between their jobs and union representation if included in the unit, are not engaged in personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3) of the Statute).

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ORDER

IT IS ORDERED that the unit sought to be clarified be, and it hereby is, clarified by excluding from said unit Raymond D. Marchakitus, Supervisory Economist, GM-0110-15; Alice K. Cullen, Economist, GM-0110-14; John P. Hightower, Computer System Analyst, GM-0334-13; and Robert E. L. Gregg, Computer System Analyst, GM-0334-13; and by including in said unit Maureen Glebes, Economist, GS-0110-14; Robert F. Clairmont, Assistant Advocate, GS-0301-14; and Gerald T. Lawson, Assistant Advocate, GS-0301-14.

Issued, Washington, D.C., March 12, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
DENVER DISTRICT, COLORADO

Respondent

and

Case No. 7-CA-1070

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 32

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the General Counsel's exceptions.1/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order. 2/

1/ The Charging Party's exceptions were untimely filed and therefore have not been considered.

2/ The Authority specifically adopts the Judge's finding that the Charging Party waived its right to bargain over the lateral reassignment of employees within a post of duty, even where no roster had been established and no vacancy announcements had been posted. We find it unnecessary, in the circumstances of this case, to distinguish between the nature of the bargaining obligations arising under section 7106(b)(2) and (3) of the Statute, or to pass upon the Judge's findings with respect to the negotiability of the Charging Party's proposals.

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ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-1070 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 12, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

INTERNAL REVENUE SERVICE DENVER DISTRICT, COLORADO Respondent and NATIONAL TREASURY EMPLOYEES UNION, INDEPENDENT, AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 32 Charging Party	Case No. 7-CA-1070

Gary A. Anderson, Esquire
For the Respondent

Mr. Frank D. Ferris
Craig Deats, Esquire: On Brief
For the Charging Party

James J. Gonzales, Esquire
Daniel Minahan, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C.

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§ 7101, et seq.[1], and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., was initiated by a charge filed on March 16, 1981 (Jt. Exh. 1). The Complaint and Notice of Hearing issued on August 28, 1981 (Jt. Exh. 2) which scheduled a hearing for November 17, 1981. By Order dated October 28, 1981, the hearing, scheduled for November 17, was indefinitely postponed (Jt. Exh. 4); by Order dated November 21, 1981 (Jt. Exh. 5(a)) the hearing, in this and other cases, was rescheduled for February 8, 1981; by Order dated January 20, 1982, the hearing, in this and other cases, was rescheduled for calendar call and hearing at 1:00 p.m. on April 19, 1982 (Jt. Exh. 5(b)); and on, or about, April 15, 1982, by conference call and agreement of all parties, the time of the calendar call, to be followed by the hearing in this case, was rescheduled for 9:00 a.m. on April 19, 1982, pursuant to which a hearing was duly held before the undersigned on April 19, 1982, in Denver, Colorado.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, May 19, 1982, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, upon timely motion of Respondent and for good cause shown, to June 18, 1982. Each party, including the Charging Party, timely filed a most helpful brief, received on June 18, 1982, which have been carefully considered. Upon the basis of the entire record,[2] including the Stipulation of Fact (G.C. Exh. 1) and my

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(5) will be referred to simply as "16(a)(5)."

2/ General Counsel filed a Motion to Correct Transcript which I find wholly meritorious, and to which the other parties filed no opposition, and it is hereby granted. In addition, I note a further obvious error on page 10 line 17, of the transcript which I correct on my own motion. The transcript, is hereby corrected as follows:

Page	Line	Error	Correction
8	10	"succeeded"	"preceded"
10	16	"of the"	"and"
10	17	"rescinded"	"refused"
14	10	"heart"	"south"
29	15	"pat"	"pay"
37	18	"revision"	"division"
48	19	"the state"	"estate"
55	7	"regional district"	"regions and districts"

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observation of the witnesses and their demeanor, I make the following findings and conclusions.

The Issues

The underlying issues are: (a) Respondent's right under the National Office, Regions and Districts Agreement (NORD) to make lateral reassignments; and (b) whether Respondent lawfully refused to negotiate as to certain proposals of the Union.

There is no dispute that Respondent's decision to create a Tax Shelter Group in its Denver District Headquarters Office by consolidating tax shelter work, already being performed, under a single supervisor was a reserved management right; nor is there any dispute that Respondent was, pursuant to § 6(b)(3) of the Statute, obligated to bargain on the impact of such decision, i.e., as the Statute provides, to negotiate "(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section. . . ." There is a dispute as to whether Respondent was obligated to bargain concerning lateral transfers and the ultimate issue is whether, as alleged in Paragraph 4 of the Complaint, ". . . Respondent . . . failed and refused to bargain in good faith with the Union on the impact and implementation of . . . the formation of a tax shelter specialty group. . . ." (Jt. Exh. 2).

Findings

1. The National Treasury Employees Union (hereinafter also referred to as "NTEU"), on March 27, 1980, was certified as the exclusive representative of all professional and non-professional employees of the Internal Revenue Service District Offices, Regional Offices and National Office, with certain exceptions not material to this proceeding (Jt. Exh. 2, Par. 3); and NTEU and the Internal Revenue Service negotiated a National Office, Regions and Districts Agreement (NORD) effective January 26, 1981 (Jt. Exh. 8).

2. The action complained of occurred after January 26, 1981, the effective date of NORD, and is subject to NORD.

3. At the end of January or the beginning of February 1981, Mr. Sidney C. Smith, Chief, Examination Division, Denver District (Tr. 141), called Mr. Frederick J. Lockhart, Jr., then President of NTEU Chapter 32 (Tr. 49) and now Executive Vice President and Steward for Chapter 32 (Tr. 48), into his office and notified him that the Denver District would be forming a tax shelter group (Tr. 50, 51, 142, 143).

4. On February 5, 1981, Mr. Lockhart sent a letter to Mr. Gerald Mihlbachler, District Director, and demanded formal negotiations on the substance and/or impact and implementation of the formation of the tax shelter group (Jt. Exh. 9).

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5. By letter dated February 18, 1981, Mr. Mihlbachler responded to Mr. Lockhart's letter of February 5; stated that, ". . . we are merely reorganizing the Examination Division in order to bring similar work (the examination of tax shelter issues) under the supervision of the same group manager. Such work already exists throughout the Denver District, but needs to be concentrated within the organization. There is no increased workload, no additional 'program', and no additional staffing and/or grade structure associated with this reorganization" (Jt. Exh. 10); Mr. Mihlbachler further stated that, "The formation of our 'Tax Shelter Group', which will be located in the Denver Headquarters Office, will be accomplished by soliciting volunteers and/or reassigning employees already working such cases within the Denver metropolitan area" (Jt. Exh. 10); and Mr. Mihlbachler invited proposals "over impact and/or implementation" (Jt. Exh. 10).

6. By letter dated February 21, 1981, Mr. Lockhart submitted eight proposals (Jt Exh. 11).

7. In late February 1981, Respondent canvassed employees as to their interest in working in a tax shelter group, a large case group and another group (Tr. 19). The record does not show, nor has General Counsel or the NTEU contended, that Respondent prepared a roster of employees interested in working in a tax shelter group, or in any other group. Moreover, no vacancy announcement for the tax shelter group was posted (Tr. 18).

8. By letter dated February 25, 1981, Mr. Mihlbachler declared NTEU's proposals non-negotiable and, further, stated,

> ". . . it is our position that further initiatives from NTEU in mid-term bargaining concerning reassignment impact and implementation are not negotiable. . . ." (Jt. Exh. 12).

Accordingly, Mr. Mihlbachler cancelled the negotiating session scheduled for February 26, and stated that Respondent would "proceed with implementation . . . as scheduled" [March 1, 1981] (Jt. Exh. 12).

9. By letter dated February 26, 1981, Mr. Lockhart protested Mr. Mihlbachler's letter of February 25; again demanded negotiations on NTEU's proposals of February 18; and requested deferral of implementation "until completion of the demanded negotiations and the reaching of a final and full agreement. . . ." (Jt. Exh. 13).

10. By undated letter (Jt. Exh. 14), Mr. Mihlbachler, replied that, as requested, he had reconsidered NTEU's bargaining proposals; that, "Since . . . you have raised the issue of changing the physical layout of office space, which is separate and apart from the reassignment issue, we are willing to discuss 'Union Proposal No. 5' . . . Therefore, we have

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rescheduled negotiations for Friday, March 6, 1981 . . . Our position on the remaining issues raised in your bargaining proposals remains unchanged from that taken in my letter of February 25, 1981. . . ." (Jt. Exh. 14).

11. The parties met on March 6, 1981, and negotiated on NTEU Proposal No. 5 and reached tentative agreement. Indeed, Mr. Lockhart stated "we initialed those changes" (Tr. 60); but Mr. Lockhart refused to finalize any agreement because "we had additional proposals that we wanted to negotiate . . . and without final and full agreement there was no agreement . . . ." (Tr. 60). Although I am aware that Mr. Lockhart testified that he asked,

> ". . . Will you negotiate with us on any procedures involved in the establishing of a tax shelter group?"

and

> ". . . Will you negotiate with us on any impact, or potential impact, arising out of this change?" (Tr. 59, 186-187).

and that Respondent declined, "The reason was the same as the reason that was given to me before because of the Febraury 25, 1981, letter . . . From Mr. Mihlbachler and 'Because we believe that if we follow the NORD agreement, we have done everything we are obligated to do'" (Tr. 59).

12. Mr. Douglas W. Duvall, now Personnel Officer (Tr. 148), at all times material had been a Personnel Management Specialist handling labor relations and other employee programs for Respondent and was chief spokesman for Respondent on March 6, 1981. Mr. Duvall testified, in part, as follows:

> "A. As I recall, the first thing that we did when we sat down in our negotiating session was to try to clarify the positions, and Mr. Lockhart asked if we had modified our position in terms of the reassignment issue, and I said no, that we had not, that it was still our position that these had been negotiated.
>
> "I asked Mr. Lockhart, basically, what NTEU's position was in terms of which kinds of changes that he saw that may have come about that gave rise to this request to negotiate, and he replied basically that there were two major things that NTEU was looking at in these negotiations. First of all, that any time management underwent any kind of reorganization that involved bargaining unit employees, that it was

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subject to full negotiation, impact and implementation negotiation, including the methods, the procedures to follow in reassigning these employees.

"Secondly, that in terms of any realignment of office space that came out of such a reorganization, they had full right to negotiate over impact and implementation of that office space realignment, prior to implementation.

"Q. During those discussions, did you close the door on him with respect to submitting proposals, additional proposals, that would go to impact or implementation?

"A. No, sir, we did not.

. . . . (Tr. 154-155).

13. Mr. Irving A. Des Roches, employed by IRS since October 1, 1969, initially as the "de facto chief negotiator", and since 1972 officially as Chief Negotiator for IRS (Tr. 85). Mr. Des Roches served as negotiator and Spokesperson for IRS in the negotiation of the NORD Agreement. Negotiations for the NORD Agreement began in August 1978 (Tr. 108), and Mr. Robert M. Tobias was Chairperson and Chief Spokesperson for NTEU. Mr. Frank D. Ferris, Director of Training and Negotiations, NTEU, first personally appeared at the NORD negotiations in October 1979 (Tr. 106, 160), and when present either acted as co-spokesperson with Mr. Tobias or, when Mr. Tobias was not present, as spokesperson for NTEU.

14. Mr. Des Roches testified in great detail, and at considerable length, concerning the negotiating history, development, meaning and intent of Article 7 of the NORD Agreement. I found Mr. Des Roches' testimony in this matter wholly credible. Mr. Ferris also testified at length concerning Article 7 and I found his testimony equally credible. Indeed, Mr. Ferris' testimony fully corroborated the testimony of Mr. Des Roches.3/

3/ Prior to testifying as a rebuttal witness, Mr. Ferris, although not an attorney, ably represented NTEU and conducted cross-examination. It is an undesirable practice for the same individual to act as representative of a party and in the same proceeding to become a witness for his party. Indeed, were Mr. Ferris an attorney, there might be ethical questions concerning such action since, as I am fully convinced, it was known well in advance that: (a) Mr. Des Roches would appear as a witness; and (b) that Mr. Ferris would almost certainly testify.
(continued)

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15. There is no doubt whatever that IRS wanted, and believed it had, the right unilaterally to make lateral reassignments. Consequently, IRS was very unhappy with the decision of the Assistant Secretary in Internal Revenue Service, Kansas City, Ogden, Chamblee, Philadelphia, Austin, Covington, Fresno, and Brookhaven Service Centers, Detroit Data Center and Martinsburg National Computer Center, A/SLMR No. 1074, 8 A/SLMR 741 (1978) (Res. Exh. 1);[4/] and the Bruce arbitration decision which "precluded management from having the right of laterally reassigning during the life of a roster" (Tr. 117, 163). In addition, the Authority, in National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275 (1981), held inter alia, that NTEU's proposal that Article 7 (Promotions/Other Competitive Actions) applied to lateral transfers and was negotiable.

16. There is also no doubt whatever that IRS in the NORD negotiations specifically sought, through negotiations, to "undo the effect of decision 1074, which was a lead case in requiring management to bargain mid-term in reorganization requests and lateral reassignments. Another part of this objective was to undo the arbitrational decision [Bruce] which precluded management from having the right of laterally reassigning employees during the life of a roster" (Tr. 116-117).

17. Mr. Des Roches described a roster as follows:

> "A. A roster is a listing of employees who have been found highly qualified for a particular position, a position which management expects there will be a number of vacancies in during a six-month period.
>
> "Q. Is a roster related to the posting of a job?

(3/ continued)

Nevertheless, I recognize that it is sometimes unavoidable for a representative to seek to testify. I permitted Mr. Ferris to testify and, since there was no conflict between his testimony concerning the parties' action, intention, and decision concerning Article 7, I need not decide whether Mr. Ferris' dual capacity affected, in any manner, his credibility.

This is not a procedure which I propose to condone or to permit except under most unusual circumstances which I found to pertain in this case.

4/ See, also, Department of the Treasury Internal Revenue Service, Jacksonville District, Jacksonville, Florida, Case No. 4-CA-446, OALJ-81-89 (Chaitovitz, J., April 15, 1981).

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"A. Yes. The job is posted -- management does not say this but everybody knows that management expects a number of vacancies in that position during a six-month period and the people respond to the announcement. From the response, a roster is built on the basis of scores achieved by those who respond. . . ." (Tr. 87).

Mr. Ferris, also described a roster as follows:

"A. A roster is the product of a particular type of vacancy announcement. A vacancy announcement can be of two kinds; one which we call ad hoc which merely announces the immediate existing vacancy in a position, or it can be an announcement to set up a roster. In the latter case, there may or may not be an immediate vacant position but there is an expectation that over the next six months for the six months of the roster, there will be several positions to be filed in that classification.

"A vacancy announcement can do one of two things and a roster is one of them. . . ." (Tr. 174-175).

18. There is no doubt whatever that, as the result of negotiations, IRS in the NORD Agreement received the right to make unilateral reassignment of employees at a post of duty. Mr. Des Roches so testified (Tr. 104-105; 107-108) and Mr. Ferris fully concurred, testifying, in part, as follows:

"A. The sole difference -- if you're asking me to look at Article 7 -- is the fact that we have changed the roster situation, as Mr. Des Roches testified. He came into bargaining, looking to undo the Bruce arbitration case. They gave us an offer in the final stages of mediation that they would give us their consideration, it would be easy for them if they used rosters, but by establishing rosters, they didn't want to hurt themselves by barring lateral reassignments. So they asked us to, in effect I guess, give up the Bruce arbitration precedent and permit them to reassign during the existence of a roster. We made that deal. We conceded that. . . ." (Tr. 180-181).

Earlier, Mr. Ferris testified,

". . . we permitted IRS to laterally reassign while a promotional roster was in existence. That right was

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granted in return for the first consideration right. . . ." (Tr. 161-162).

and,

"Q. . . . Can management effect a lateral reassignment without using competitive procedures, even though a roster has been established under NORD?

"A. I'll explain it with a different perspective. For one example, if it's a lateral reassignment between post of duties, no, they have to use the competition that flows through seniority. If it's a lateral -- and you can see that through Article 29. It if's a lateral reassignment associated with the changes found to be negotiable, then Article 29, Section 3 comes in.5/ If it's a lateral reassignment that does not have a change, it is not associated with moving from one post of duty to another, then, even if a roster is in existence, they are permitted to make that reassignment without using competitive procedures. You have to look at associated effects that the contract brings out. Is there a different post of duty; is there a change connected with it? It's a totality" (Tr. 177-178).

19. General Counsel, in his Brief, states, in part, as follows:

". . . Whereas the competitive procedures in MDA-3, Article 7 [the prior agreement, Jt. Exh. 6] applied when a roster was established, those procedures do not apply in NORD when a roster has been established. Respondent's argument seems to be, then, that the competitive procedures in NORD Article 7 do not apply to the type or reassignments involved in this case. The General Counsel concedes as much (Emphasis supplied). Vacancy announcements were not posted for the Tax Shelter Group positions (Robbins, Tr. 18; 20-22) and the positions were filled by canvassing for

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5/ Article 29, Section 3, provides:

"The Employer agrees to give affected employees fifteen (15) working days written notification of reassignments to a different post of duty" (Jt. Exh. 8, p. 28).

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volunteers, not by selecting from a roster. . . ." (G.C. Brief, p. 18).

20. Article 7, Promotions/Other Competitive Actions, of the NORD Agreement provides, in part, as follows:

"Section 1

"The purpose of this Article is to ensure that all competitive promotions to bargaining unit positions and certain placement actions as set forth in Section 2 below are made on a merit basis by means of systematic and equitable procedures so that employees are given the opportunity to develop and advance to their full potential. The purpose of this Article is also to provide that Internal Revenue employees receive first consideration for all actions set forth in Section 2B below.6/ To that end, the Employer and the Union agree to the following procedures (Emphasis supplied).

"Section 2

"A
"The terms of this Article will not apply to the filling of bargaining unit vacancies by lateral reassignment, demotion or reinstatement, except as set forth in B below . . . (Emphasis supplied).

"B
"The terms of this Article will apply to all other placement actions within the bargaining unit (Emphasis supplied). The following are examples of such actions:

. . .

6/ It was for this underscored concession by IRS that Mr. Ferris testified,

". . . We made that deal (Emphasis supplied, Tr. 180-181).

". . . we permitted IRS to laterally reassign while a promotional roster was in existence. That right was granted in return for the first consideration right. . . ." (Tr. 161-162).

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"6. Filling a position by lateral reassignment if a vacancy announcement has been posted, unless (1) unforeseen circumstances of an extraordinary nature become known subsequent to the posting of vacancy announcement; or (2) a roster has been established."

21. Following the negotiating session of March 6, 1981 Respondent by memorandum dated March 11, 1981, notified ten named individuals of their reassignment to the Tax Shelter Group, Group 1225, effective March 22, 1981. All affected individuals[7/] were in the Denver District (G.C. Exh. 2).[8/]

Conclusions

For the reasons set forth above, I find and conclude that IRS, through negotiations, in the NORD Agreement obtained the right to make unilateral reassignment of employees within a post of duty when no vacancy announcement has been posted. Accordingly, as IRS had obtained, under the NORD Agreement, the right to make lateral reassignments, Respondent's decision to laterally reassign employees to Group 1225, the Tax Shelter Group, was not a matter as to which Respondent was required to bargain and Respondent's issuance of its memorandum of March 11, 1981 (G.C. Exh. 2) did not violate either § 16(a)(5) or § 16(a)(1) of the Statute.

In reaching this decision, I have given careful consideration to the decision of Judge Arrigo, in Internal Revenue Service (District, Region, National Office Units) and National Treasury Employees Union, Case Nos. 3-CA-2206 and 3-CA-2876 (OALJ-82-58) (March 5, 1982), and find it both legally and factually distinguishable from the present case and neither controlling nor determinative herein. First, the Commodity Tax Shelter proposal was made on August 11, 1980, and the Windfall Profit Tax proposal was made on June 19, 1980. In each instance, the union's

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7/ G.C. Exhibit 2 appears to show a name, Mr. Ron Metcalfe, as having been deleted. Counsel for General Counsel stated that Mr. Metcalfe's name has not been deleted, that this was simply highlighting marks." Mr. Metcalfe was, and is part of Group 1225 (Tr. 26).

8/ Ms. Linda Robbins testified that she had stated that she was interested in working in the Tax Shelter Group ". . . if I could be assigned to a Boulder place of duty" (Tr. 20); that when she was informed in early March 1981, that she would be assigned to Group 1225, which would be located in the Denver Office, she filed a grievance, dated March 23 and an amended grievance dated March 27, 1981, which was settled at a meeting on April 8, 1981, pursuant to which, ". . . I could work in the Boulder Office" (Tr. 22).

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proposals were made in 1980 under the predecessor agreement to NORD and Judge Arrigo specifically held, in part, as follows:

> "I further reject Respondent's contention that the terms of the NORD agreement govern the matter at issue herein and by executing the NORD agreement the Union waived its right to continue negotiations on the procedures for staffing CTS and WPT programs.
>
> ". . . under MDA III, the predecessor agreement between the parties, the parties had a practice of periodically negotiating over reassignments of similar personnel actions to accommodate employees who were being affected by a reorganization. . . .
>
> ". . . Thus, the negotiations on staffing began in September 1980 and the parties recognized during the December 22, 1980 discussion, that intervention by the Federal Mediation and Conciliation Service would be required. The services of the FMCS were invoked . . . and the parties proceeded to mediation on February 2, 1981 and then to impasse proceedings on March 26. At no time to this point did either the Union or Respondent by its conduct indicate other than a desire to resolve their dispute following the practice established under MDA III, i.e. negotiation. Neither the language of the NORD agreement executed January 26, 1981, nor testimony relating to discussions giving rise to the NORD agreement nor at any other time, indicate that the dispute concerning the CTS and WPT programs was to be governed by NORD.
>
> . . .
>
> "Accordingly, I conclude in all the circumstances that the execution of the NORD agreement did not constitute a waiver of the Union's right to negotiate to finality under MDA III the staffing procedures to be used vis-a-vis the CTS and WPT programs."

By contrast, the lateral reassignments involved in the present case arose after the negotiation of the NORD Agreement and are governed solely by the NORD Agreement.

Second, the record in this case shows that IRS sought in the NORD Agreement the right to make unilateral reassignment of employees at a post of duty.

Third, the record in this case shows that NTEU, as Mr. Ferris

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testified, ". . . made that deal. We conceded that. . . ." (Tr. 181); ". . . we permitted IRS to laterally reassign while a promotional roster was in existence. That right was granted in return for the first consideration right. . . ." (Tr. 161-162); IRS sought to "undo the Bruce arbitration case" (Tr. 180) and NTEU agreed (Tr. 181).

Consequently, while I do not disagree in the slightest with the decision of Judge Arrigo that nothing in the NORD Agreement purported to waive rights which existed under MDA III as to personnel actions instituted under MDA III, the record in this case is clear that IRS in the NORD Agreement sought and obtained the right to make unilateral lateral reassignments of employees even, as the record shows, when a roster has been established. Necessarily, as Mr. Des Roches testified, if IRS obtained the right in NORD to make lateral reassignments when a roster had been established, as Mr. Ferris conceded, then it also had the right to make such lateral reassignments when no roster existed. As noted, the record does not show that a roster existed in this case and, because a roster, as Mr. Ferris explained, is the product of a vacancy announcement and it is conceded that no vacancy announcement was posted, I would assume that no roster existed - indeed General Counsel admits that there were no selections from a roster (G.C. Brief, p. 18); nevertheless, even if a roster existed, the testimony, including that of Mr. Ferris, plainly shows that NTEU in the NORD Agreement ". . . permitted IRS to laterally reassign while a promotional roster was in existence. That right was granted in return for the first consideration right. . . ." (Tr. 161-162).

While IRS in the NORD Agreement received the unilateral right to laterally reassign employees, and the exercise of that right imposed no obligation on Respondent to bargain about its lateral reassignment of employees to Group 1225, nothing in the NORD Agreement waived, or purported to waive, Respondent's obligation to bargain as to "appropriate arrangements for employees adversely affected by the exercise of any such authority . . ." (§ 6(b)(3)), although, by granting IRS the unilateral right to make lateral reassignments, NTEU necessarily gave up, or waived, the right to negotiate concerning procedures IRS would follow in the exercise of this contractual unilateral right. Stated otherwise, a contractual grant of authority to take unilateral action differs from mere reservation of a management right in that, by granting management the right to act unilaterally, the union has agreed not only that management may act, but, has agreed that the manner by which the right is exercise, including how, when, or whether the right is exercised, has been given wholly to management; whereas, a reservation of a management right constitutes only a right to act, not a grant of authority as to the manner by which the right is exercised. As to the latter, i.e., reservation of a management right, the union retains the right to negotiate concerning both the procedures management will observe (§ 6(b)(2)) and appropriate arrangements for employees adversely affected by the exercise of the authority (§ 6(b)(3)); but as to the former, i.e., the grant of

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authority to take unilateral action, the union, by its grant of unilateral authority, has agreed that the procedures management will observe are not negotiable because it has given those rights to management, and, accordingly, the union retains only the right to negotiate concerning appropriate arrangements for employees adversely affected by the exercise of the authority granted.

Respondent's letter of February 25, 1981, in which it stated, in part,

> ". . . that further initiatives from NTEU in mid-term bargaining concerning reassignment impact and implementation are not negotiable. . . ." (Jt. Exh. 12).

was in derogation of its obligation to bargain as to impact of its decision to laterally reassign employees and Respondent did thereby violate both §§ 16(a)(5) and (1) of the Statute. However, NTEU, by letter dated February 26, 1981, protested Respondent's refusal to negotiate, stating, in part, that,

> ". . . Chapter 32 has previously and timely submitted written demands pursuant to your February 18, 1981, letter request. These proposals are hereby re-urged upon you" (Jt. Exh. 13).

Respondent, by undated letter, stated that it had reconsidered NTEU's bargaining demands; that it found NTEU's Proposal No. 5,

> ". . . separate and apart from the reassignment issue, we are willing to discuss 'Union Proposal #5 from your letter of February 21, 1981. Therefore, we have rescheduled negotiations for Friday, March 6, 1981 at 8:00 a.m. to discuss that issue. Our position on the remaining issues raised in your bargaining proposals remains unchanged from that taken in my letter of February 25, 1981" (Jt. Exh. 14).

In addition, Respondent in the same letter informed Mr. Lockhart that implementation would be delayed until after March 6, 1981 (Jt. Exh. 14).

The parties did meet, negotiate, and reached agreement on March 6, 1981, on NTEU Proposal No. 5. There is no dispute that Respondent, on March 6, 1981, refused to bargain on: Union Proposal for Preamble; Union Proposals 1, 2, 3, and 4; and, because NTEU, although it initialed, i.e. agreed to, changes on Proposal No. 5, declined to conclude any agreement unless or until there was "final and full agreement" on all of its proposals (Tr. 60), Respondent asserts that NTEU proposals 6, 7, and 8 never became "ripe" for negotiations. As NTEU proposals 6, 7, and 8

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presuppose the existence of an "agreement", which NTEU declined to conclude, and as the record does not show that NTEU separately addressed these proposals, no purpose would be served in considering these proposals further.

Two questions remain: (a) was Respondent required to bargain on NTEU proposals 1, 2, 3, and 4 (and NTEU's proposal for Preamble)?; and (b) Did NTEU seek to bargain on any matter other than its written proposals?

(A) NTEU Proposals (Jt. Exh. 11)
Preamble.[9/] NTEU's proposal stated,

in pertinent part that,

> ". . . The purpose of this agreement is to establish consistent procedures for assignment of employees to the Denver District Tax Shelter Group" (Jt. Exh. 11).

The procedures sought by NTEU are set forth in proposals 1 through 4, discussed hereinafter. NTEU's objective clearly was to negotiate procedures for the assignment of employees; but by the NORD Agreement IRS had obtained the right unilaterally to make lateral transfers of employees.

Proposal No. 1. This set forth the procedures for filling vacancies. Under other circumstances, I have no doubt that such proposal would be negotiable, indeed, substantially similar proposals were held to be negotiable under prior IRS-NTEU Agreements, Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, 4-CA-446, OALJ-81-89 (April 15, 1981); Internal Revenue Service (District, Region, National Office Units), 3-CA-2206, 3-CA-2876, OALJ-82-58 (March 5, 1982); see, also, National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 6 FLRA 508, 514 (1981). But the right unilaterally reassign employees was a right IRS had sought in the NORD negotiations and was a concession granted by NTEU in the NORD Agreement in exchange for a right long sought by NTEU and offered by IRS. As Respondent's right to laterally reassign had been negotiated, Respondent was under no obligation to bargain on proposal No. 1. Proposal No. 1 was directed at the filling of vacancies, not to impact of Respondent's exercise of its negotiated right to make lateral reassignments.

9/ The parties do not separately address the Preamble, and, since it, like proposals 6, 7, and 8, is significant as a bargaining demand only in the context of an "agreement", it may be unnecessary to consider it further. I include it only because it directly states the purpose and objective of NTEU.

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Proposal No. 2. This proposal was as follows:

> "The Tax Shelter Group initially, at least, will have its location in the Denver headquarters office. However, no employee, who is involuntarily reassigned . . . and who at this time of his/her reassignment is located in an office other than the one in which the Group is located, will be forced to relocate to the office when the Group is located. Any such employee will be permitted to physically remain in the group and office where he/she is then located, even though for purposes of group assignment and group function, such as group meetings, said employee's group will be the Tax Shelter Group."

By seeking to restrict relocation from one group to another this proposal also sought to limit the contractually established right of Respondent to make lateral transfers of employees. Moreover, the proposal was not negotiable because it conflicts with Respondent's right, pursuant to § 6(a)(1) of the Statute, to determine its organization, American Federation of Government Employees, AFL-CIO, Local 3805 and Federal Home Loan Bank Board, Boston District Office, 5 FLRA No. 94 (1981); directly interferes with Respondent's right, pursuant to § 6(a)(2)(A) of the Statute, to assign employees, Department of Defense v. FLRA, 659 F. 2d 1140, 107 LRRM 2901 (D.C. Cir. 1981); and bargaining, pursuant to § 6(b)(1) of the Statute, as to ". . . the number, types, and grades of employees or positions assigned to any organizational subdivision. . .", is only "at the election of the agency" and Respondent elected not to negotiate concerning this proposal.

Proposal No. 3. This proposal was as follows:

> "Assignment to the Tax Shelter Group will not adversely affect an employee's opportunities or consideration for developmental assignments, e.g. OJI, classroom instructor, detail to review, etc."

The record does not show the relevancy of this proposal to impact of the lateral transfers of employees from various groups to the tax shelter group. Indeed, the wholly credible testimony of Mr. Sidney C. Smith, Chief, Examination Division, Denver District, showed that assignment to a specialty group does not affect promotional opportunities that, ". . . You have the same promotional opportunities whether you're in the specialty group or a general program group. . . ." (Tr. 141); and that assignment to the tax shelter group was not assignment to a specialty group, such as the excise tax group, for the reasons that: they continue to work income tax, and, while they concentrate on tax shelter, they have related pickup type returns, which may involve corporations, partnerships, or individuals, of the ". . . same type that they are working in

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the general areas. . . ." (Tr. 142). Nevertheless, if the subject matter of this proposal were material to impact of lateral assignments, it was already governed by the provisions of Article 12 of the NORD Agreement. Thus, by way of example, Article 12, Section 5A provides,

> "1. When training is given primarily to prepare employees for promotion, selection for the training will be made under the competitive promotion procedure.
>
> "2. In addition, selection of on-the-job instructors and classroom instructor positions will be made under the competitive promotion procedures" (Jt. Exh. 8, P. 12).

General Counsel effectively concedes the applicability of Article 12, stating that, "It is true that the Union proposal raises issues embraced by the term 'training'. . . ." (General Counsel Brief, p. 12); but his assertion that "nothing in NORD Article 12 states it is the final expression of the parties on this subject nor is it conceivable that it embraces the particular needs of employees in every field of tax work" (General Counsel Brief, p. 12), is a non sequitur and his quotation from Internal Revenue Service, Case No. 3-CA-1067, OALJ 82-78 (1982), that nothing in the NORD Agreement, "waives the Union's right to negotiate the impact and implementation of specific training programs, or training in general" is a red herring since, clearly, this case involved no training program whatever. Indeed, "training" enters the picture only because the provisions of Section 5A which address, inter alia, OJI and classroom instructor selection, are part of Article 12 which is entitled "Training". Accordingly, Respondent was under no obligation to bargain as to Proposal No. 3.

Proposal No. 4. The primary thrust of this proposal was to make the assignment to the tax shelter group rotational, i.e., employees would be rotated out of the tax shelter group within 27 months. In addition, NTEU requested, as part of Proposal No. 4, the adoption, in part, of the following language, from a prior local agreement, relating to training:

> ". . . The Employer recognizes that some employees will need training when they are rotated into income tax, therefore, formal and informal training will be available on a case by case basis."

As to rotation, Proposal No. 4 conflicts with management's right to assign employees under § 6(a)(2)(A) of the Statute. American Federation of Government Employees, AFL-CIO, Local 695 and Department of the Treasury, U.S. Mint, Denver, Colorado, 3 FLRA 43 (1980). While an agency may, pursuant to § 6(b)(1) of the Statute, at its election, bargain on such assignments, Respondent elected not to negotiate on this proposal

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and whether it had elected on some prior occasion to negotiate on rotation of other assignments is immaterial, as, plainly, Respondent did not elect to bargain in this instance and, absent its election to negotiate, Respondent had no obligation to bargain. The local agreement referred to by NTEU was entered into in 1978 and, as the record shows, resulted from a management proposal to confirm an existing practice. Not only is the validity of the 1978 local agreement unquestioned but Article 29, Section 4 of the NORD Agreement provides that,

> ". . . Supplemental Agreements and/or memoranda of understanding regarding rotation would be incorporated into the Agreement with opportunity for NTEU to complete negotiations on the subject which are in progress on the effective date of the new Agreement" (Jt. Exh. 8, p. 28).

Consequently, IRS in the NORD Agreement contractually "elected" to negotiate concerning rotation but only as to negotiations in progress on the effective date of the NORD Agreement, January 26, 1981. This "election" to negotiate did not extend to NTEU's Proposal No. 4 and Respondent expressly declined to bargain on Proposal No. 4.

As to training, it is uncertain what was intended. Certainly, the language, from the 1978 local agreement, was ill suited, or as Respondent states (Respondent's Brief p. 18, n. 13), reference to rotation into "income tax" is misplaced for the reason that tax shelter work involves solely income taxes. In any event, training as involved was fully governed by Article 12, Sections 1 and 3 of the NORD Agreement and Respondent was not obligated to bargain further locally.

I have given careful consideration to General Counsel's assertion that Respondent did not declare NTEU's proposals non-negotiable. Without deciding whether in an enforcement proceeding, there is a legal difference between a refusal to bargain on a proposal and a refusal to bargain because a proposal is deemed "non-negotiable,"10/ as the record

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10/ § 17(c)(1) of the Statute provides, in part, that:

> ". . . if an agency . . . alleges that the duty to bargain . . . does not extend to any matter, the exclusive representative may appeal the allegation to the Authority. . . ."

§ 17(c)(3) of the Statute provides, in part, that:

> "(3) On or before the 30th day after the . . . receipt . . . of the petition . . . the agency shall -

(continued)

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shows that Respondent stated reasons for its refusal to bargain, I conclude that Respondent did effectively declare NTEU's proposals non-negotiable, e.g. Respondent refused to bargain because NTEU's proposals were governed by the NORD Agreement, even though Respondent did not use term "non-negotiable" at least as to certain proposals.11/ Thus, Respondent on March 6 stated, inter alia,12/ that it would not negotiate, except on Proposal No. 5, because NTEU's proposals, except No. 5, were governed by the NORD Agreement, or, as Mr. Lockhart stated, Respondent asserted that, ". . . if we follow the NORD agreement, we have done all that we are obligated to do" (Tr. 58). Indeed, Respondent's statement in agreeing to negotiate as to Proposal No. 5, because it "is separate and apart from the reassignment issue" had further made it clear that, in its opinion, only Proposal No. 5 concerned impact while the other proposals concerned the reassignment issue.

In truth, it is far from clear that in an enforcement proceeding the form of a refusal to bargain is significant. For example, a refusal to bargain by an agency is an unfair labor practice only if there is a

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(10/ continued)

> "(A) file with the Authority a statement -
> ". . .
> "(ii) setting forth in full its reasons supporting the allegation. . . ."

11/ Mr. Duvall, although stating that Respondent felt Proposals 2 and 4 were non-negotiable because they interferred with management's rights (Tr. 157) stated that he did not declare proposals 2 and 4 non-negotiable (Tr. 157).

12/ In addition, in his letter of February 5, 1981, Mr. Lockhart had demanded ". . . formal negotiations on the substance and/or impact and implementation. . . ." (Jt. Exh. 9); Respondent by its letter of February 18, 1981, stated that it would entertain ". . . proposals which you may have over impact and/or implementation. . . ." (Jt. Exh. 10); Respondent in its letter of February 25, 1981, after review of NTEU's proposals (Jt. Exh. 11), stated that in the NORD Agreement, ". . . we have specifically set out the situations in which reassignments are subject to the negotiated agreement. Therefore, it is one position that further initiatives . . . concerning reassignment impact and implementation are not negotiable. . . ." (Jt. Exh. 12); and in its undated letter, following Mr. Lockhart's letter of February 26, 1981 (Jt. Exh. 13), Respondent stated that it had, as requested, reconsidered NTEU's bargaining proposals and had concluded that, ". . . the physical layout of office which is separate and apart from the reassignment issue" was negotiable (Jt. Exh. 14).

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refusal to bargain in good faith ". . . as required by this chapter" (§ 16(a)(5)) and an agency is not required to negotiate as to those rights reserved to management by § 6(a) of the Statute. Therefore, in order to find an unfair labor practice, it must be determined that the agency was required by Chapter 71 to negotiate, regardless of the manner in which the refusal to bargain arises.

(B) Did NTEU Seek to Bargain on Any Matter Other than Its Written Proposals?

At the hearing, I rejected General Counsel's Exhibit No. 8, which was a portion of a handwritten letter by Mr. Lockhart, presumably written on March 6, 1981, after the negotiating session, although the date of the letter was also given as March 3, 1981 (Tr. 187). In his Brief, General Counsel has urged reconsideration of this ruling and states that, "It is submitted that the self-serving aspects of the letter are outweighed by its probative aspects" (General Counsel Brief, p. 11, n. 4). I have reconsidered my ruling and, in agreement with the request of the General Counsel, reverse my prior ruling and hereby receive General Counsel's Exhibit 8. The full text of General Counsel's Exhibit 8 is as follows:

> "Management's current position, we would consider any implementation an unfair labor practice. I also stated (also no less than twice) that our position was that Management had the right to make the change but that we had the absolute right to negotiate the substance of our proposals and that Management had a corresponding duty to negotiate on these proposals.
>
> "We submitted each of our proposals. Doug Duvall gave me specific responses to Union Proposals on the Preamble and #'s 1, 2, and 4. That position was that Management's position was the same as stated in Mihlbachler's 2/25/81 letter to me and that Management's obligation to negotiate was fulfilled as long as NORD followed. Doug Duvall and Sid Smith agreed that the same could be said of all remaining Union Proposals except Proposal # 5 which we were negotiating. Suzanne and I asked the specific questions re Management's refusing to negotiate (1) any proposal pertaining to procedures being used to establish the tax shelter group and implement the change and (2) any proposal relating to the adverse effect on employees. Doug's answer was that these were correct statements and he again referred us to NORD and the 2/25/81 letter. Also in this regard Doug stated in answer to my specific question, that Management was not declaring any proposals non-negotiable but that they were just saying that

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these proposals were previously negotiated under NORD" (G.C. Exh. 8).

That Mr. Lockhart raised the question of adverse impact bargaining is clear enough; but was his question directed only to NTEU's written bargaining proposals? I conclude, after careful review of the record, that his question concerned only NTEU's written proposals. Thus, the record shows: (a) Mr. Lockhart's initial testimony that he asked "Will you negotiate with us on any impact, or potential impact, arising out of this change" (Tr. 59), was substantially altered by his testimony or rebuttal, that he asked, "whether or not they were willing to negotiate any proposal relating to the adverse impact" (Tr. 186); (b) Mr. Lockhart's letter fully confirms his testimony on rebuttal and states that he asked "specific questions re Management's refusing to negotiate . . . (2) any proposal relating to the adverse effect on employees" (G.C. Exh. 8) to which Mr. Duvall responded "that these were correct statements and he again referred us to NORD and the 2/25/81 letter" (G.C. Exh. 8); (c) the fact that no proposal was ever made by NTEU except its written proposals of February 21, 1981 (Jt. Exh. 11); (d) Mr. Lockhart's letter further stated that, "Doug stated in answer to my specific question, that Management was not declaring any proposals non-negotiable but that they were just saying that these proposals were previously negotiated under NORD" (G.C. Exh. 8), which emphasized that, as Mr. Lockhart understood, "proposals" i.e. "these proposals" meant NTEU's written proposals; (e) Mr. Duvall's wholly credible testimony that he did not close the door with respect to additional proposals that would go to impact or implementation and that had additional proposals on impact or implementation been submitted they would have been considered; and (f) the fact that Respondent did negotiate on impact and implementation (Proposal No. 5). Perhaps Mr. Lockhart was left with an "impression" that further proposals "would be futile" (Tr. 187); but he made no proposal to test his impression. Certainly, Mr. Duvall's conviction was equally strong, and equally valid, that he had not "closed the door" on additional proposals. In the absence of a specific refusal to bargain there is no basis on which an unfair labor practice may be found. To be sure, Respondent refused to bargain on NTEU's Proposals 1 through 4, but for reasons set forth above, Respondent was not obligated to bargain on Proposals 1 through 4.

Although not addressed by the parties, I have also considered whether the portion of Respondent's letter of February 25, 1981, in which it stated, in part, that ". . . further initiatives from NTEU . . . concerning reassignment impact and implementation are not negotiable. . . ." (Jt. Exh. 12), was relied upon by NTEU as the basis for not submitting additional proposals on impact and implementation; but the record does not show any such reliance. To the contrary, Mr. Lockhart made it clear that his "impression" was the result, solely, of Mr. Duvall's response to his two questions concerning NTEU's written proposals.

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While I have found that the evidence affirmatively shows that Mr. Lockhart directed his question concerning adverse impact bargaining to NTEU's written proposals, alternatively, the preponderance of the evidence fails to demonstrate that Respondent refused to negotiate on the impact of its decision by foreclosing submission of additional proposals addressing impact. It is conceded that NTEU did not make or submit any proposal other than its written proposals of February 21, 1981; Mr. Duvall's testimony that he did not "close the door" to additional proposals on March 6, 1981, was unequivocal; and, at most, Mr. Lockhart professed an "impression" that submission of additional proposals would be futile, notwithstanding that the parties did, in fact, bargain as to impact and implementation with regard to NTEU's Proposal No. 5.

Having found that Respondent did not refuse to bargain in good faith as required by the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 7-CA-1070 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 4, 1982
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

RED RIVER ARMY DEPOT
TEXARKANA, TEXAS

Activity

and

Case No. 6-RO-30007

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-52, SEIU
(AFL-CIO, CLC)

Labor Organization/Petitioner

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute), a hearing was held before hearing officers of the Authority. The hearing officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.*/

Upon the entire record in this case, the Authority finds: The Petitioner, National Association of Government Employees, Local R14-52, SEIU (AFL-CIO, CLC), seeks an election in a unit composed of all nonappropriated fund (NAF) employees at the Red River Army Depot (Depot) in Texarkana, Texas including the NAF employees in the Central Nonappropriated Fund Payroll Office (CNPO). The Activity contends that the unit sought is inappropriate, as it seeks to join the employees of the CNPO in a unit with the NAF Depot employees. The Petitioner will not accept any unit of nonappropriated fund employees that does not include the CNPO employees.

The Depot is under the command of the Army Materiel Development and Readiness Command (DARCOM). According to the record, NAF Depot employees are located within three Depot directorates: Administration and Services, Resource Management, and Management Information Services. They

*/ On April 6, 1984, the Authority issued an Order Remanding Case to the Regional Director for the purpose of reopening the hearing and developing a full and complete record in this proceeding, as the record initially contained insufficient facts and evidence upon which to decide the issues presented.

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are engaged in work including accounting, food and beverage service, recreational services, and computer operations. While most of the Depot's NAF employees perform functions affecting only the Depot, the employees of the Central Accounting Branch of the Resource Management Directorate operate an accounting system for NAF activities throughout DARCOM, including the Depot. All NAF employees of the Depot report in the chain of command to the Depot Commander.

By contrast, the CNPO is considered a tenant organization of the Depot, and is under the direct command of the Assistant Comptroller of the Army (ACOA) rather than DARCOM. Its function is to provide payroll services for nonappropriated fund employees worldwide, except Korea. Unlike the other employees in the petitioned-for unit, the CNPO employees are physically located some 18 miles from the Depot and do not report to the Depot Commander. In addition, unlike the other NAF employees at the Depot, CNPO employees are in a separate area of consideration for merit promotion purposes and a separate competitive area for reductions-in-force. While CNPO receives some personnel support such as record-keeping and storage from the NAF Personnel Office at the Depot pursuant to an Inter-Service Support Agreement with the ACOA, the personnel policies, practices and matters affecting the working conditions of CNPO employees are established by the ACOA.

Based upon the foregoing, the Authority concludes that the employees in the CNPO do not share a clear and identifiable community of interest with the NAF employees located at the Depot, and that the unit sought, which would include CNPO employees with the NAF Depot employees, is not appropriate under section 7112(a)(1) of the Statute.[1/] In this regard, it is noted particularly that CNPO has a mission which is separate and distinct from the NAF functions at the Depot; that the CNPO employees are separately considered for merit promotion and RIF purposes; and that the CNPO employees are under separate supervision and a separate command than the other employees in the petitioned-for unit. Accordingly, the Authority concludes that the petitioned-for unit is not

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1/ Section 7112(a)(1) provides in pertinent part:

§ 7112. Determination of appropriate units for labor organization representation

(a)(1) The Authority shall determine . . . any unit to be an appropriate unit only if the determination will ensure a clear and indentifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

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appropriate for exclusive recognition under section 7112(a)(1) of the Statute and the petition shall therefore be dismissed.2/

ORDER

IT IS ORDERED that the petition in Case No. 6-RO-30007 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 12, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In order to be found appropriate, a proposed unit must meet all of the three criteria for appropriateness established in section 7112(a)(1) of the Statute; a failure to satisfy any one of them must result in a finding that the unit sought is inappropriate. Department of the Navy, Navy Publications and Printing Service Branch Office, Vallejo, California, 10 FLRA 659 (1982); United States Army Corps of Engineers, Fort Worth District, Somerville Project Office, 15 FLRA No. 160 (1984).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. 0-NG-571

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, REGION VII

Agency

ORDER DISMISSING PETITION FOR REVIEW

This matter is before the Authority at this time pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute and part 2424 of the Authority's Rules and Regulations on a petition for review of a negotiability issue filed by the Union. For the reasons stated below, it has been determined that the Union's petition for review must be dismissed.

From the submissions of the parties, it appears the Agency alleged that the duty to bargain did not extend to the Union's proposal concerning the establishment of a competitive area. The Union also filed an unfair labor practice charge with the Authority's Regional Office charging that the Agency had committed an unfair labor practice by allegedly preventing local management from bargaining over the competitive area proposal pursuant to an Agency regulation for which a compelling need was asserted. At the Union's request, further action on the negotiability appeal was suspended pending resolution of the unfair labor practice complaint. The unfair labor practice complaint was resolved by the decision in Department of Health and Human Services, Washington, D.C. and Department of Health and Human Services, Region 7, Kansas City, Missouri and National Treasury Employees Union, 16 FLRA No. 44 (1984) in which the Authority found no compelling need for the Agency regulation to bar negotiation on the competitive area proposal. The Union acknowledges that the holding in the unfair labor practice proceeding is dispositive of the instant negotiability dispute and, therefore, states: "Since the issues have been resolved we see no need for the Authority to continue processing the instant negotiability petition."

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Upon careful consideration of the parties' submissions, it has been determined that, based upon the decision in the cited unfair labor practice case, there is no longer an issue as to whether the Union's proposal is within the Agency's duty to bargain under the Statute.*/

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 15, 1985

Harold D. Kessler
Managing Director for Case Processing

*/ The Agency's request to supplement its statement of position is denied pursuant to section 2424.8 of the Authority's Rules and Regulations, since no additional submissions had been requested by the Authority and the completed record provided a sufficient basis for disposing of this case.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE AND
U.S. CUSTOMS SERVICE, REGION IX
CHICAGO, ILLINOIS

Respondent

and

Case No. 5-CA-30046

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Motion to Transfer Proceeding to the Authority and Stipulation" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts and the contentions of the parties, the Authority finds:

The National Treasury Employees Union (Union) represents a unit of various employees of the U.S. Customs Service including inspectional employees assigned to the Metro Airport Detroit District in Detroit, Michigan (hereinafter Metro Airport). The Detroit District is part of the U.S. Customs Service's Region IX, located in Chicago, Illinois. The complaint herein alleges that the Respondent, U.S. Customs Service and U.S. Customs Service, Region IX, violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally implementing a change in the duty hours of inspectional employees at the Metro Airport without bargaining over the substance, impact and implementation of the change.

The record indicates that at least since 1975, a practice existed at the Metro Airport whereby customs inspectors worked a 9:00 a.m. to 5:00 p.m. shift with no formal lunch break or lunch period included in the shift. On September 15, 1982, the Respondent notified the Union of its intent to change the existing 9:00 a.m. to 5:00 p.m. tour of duty to 9:00 a.m. to 6:00 p.m. and to include a one-hour non-paid meal period. The Respondent further advised that the proposed change would become effective on October 3, 1982. The Union thereupon requested

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bargaining over the substance, impact and implementation of the change and submitted several proposals. The record indicates that the parties met on October 1, 1982, and bargained concerning various aspects of the proposed change, but that the Respondent refused to bargain over the substance of the change. Among the matters agreed to by the parties was the duration of the meal period. Initially, the Respondent proposed that there be a one-hour meal period. Ultimately, the parties agreed to a thirty-minute non-paid meal period. The Respondent then indicated that the starting and quitting times of the shift would be 9:30 a.m. to 6:00 p.m. and refused to bargain over the Union's proposed starting and quitting times of 9:00 a.m. to 5:30 p.m. or its subsequently proposed 8:30 a.m. to 5:00 p.m. tour of duty. Implementation of the 9:30 a.m. to 6:00 p.m. starting and quitting times took place on November 1, 1982.

The parties have stipulated that the change in hours did not establish an additional shift or tour of duty but merely changed the existing tour of duty for customs inspectors. Additionally, the parties have stipulated that the change substantially impacted on the working conditions of bargaining unit employees inasmuch as employees received overtime pay for hours worked beyond 5:00 p.m. prior to the change but only for hours worked after 6:00 p.m. subsequent to the change.

The Respondent essentially argues that no bargaining obligation existed with respect to the change in starting and quitting times by virtue of language contained in Article 21, Section 2 of the parties' expired agreement. That language provided as follows:

ARTICLE 21

HOURS OF WORK

> Section 2. For employees engaged in inspectional activities, law enforcement activities, and their required support personnel (normally those employees working under the jurisdiction of the Office of Border Operations), the employer shall establish, maintain and change those shifts, tours of duty and hours of work to best promote the efficient and effective accomplishment of the mission and operations of the Service.

The Respondent argued that the terms of this provision continued notwithstanding the expiration of the agreement.

In Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C., 14 FLRA 644 (1984), the Authority determined that a

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contractual waiver of bargaining rights constituted a permissive subject of bargaining under the Statute. The Authority noted that while a waiver of bargaining rights was binding on the parties during the life of an agreement, once that agreement expired, either party was free to terminate such practice. Having found the waiver provision to be a permissive subject of bargaining, the Authority then concluded that agency management was not free to insist upon its continuation once the union indicated that it no longer wished to be bound by such a provision but instead sought to exercise its statutory bargaining rights.

In the instant case, the Authority finds that Article 21, Section 2 of the expired agreement constituted a waiver of the Union's statutory right to bargain. While binding during the life of the agreement, it was terminable by either party upon the agreement's expiration. When the Respondent notified the Union of its intention to change the starting and quitting times for customs inspectors at the Metro Airport, and the Union requested bargaining over the substance of the decision as well as its impact and implementation, the Union was expressing its desire that it no longer wished to be bound by the provision but instead wanted to exercise its statutory bargaining rights. Accordingly, the Respondent was no longer free to insist upon the continuation of this provision so as to preclude bargaining over the change in starting and quitting times. See Department of Transportation, Federal Aviation Administration, Washington, D.C., and its Chicago Airways Facilities Sector, 16 FLRA No. 71 (1984).

With respect to the Respondent's obligation to bargain over the change in starting and quitting times, the Authority finds that such a matter was within the required scope of bargaining under the Statute. The Authority has previously held that the decision to change starting and quitting times is subject to the duty to bargain unless it can be demonstrated that such a change directly or integrally relates to the numbers, types or grades of employees or positions assigned to a work project or tour of duty so as to be determinative of such numbers, types or grades and therefore negotiable solely at the election of the agency under section 7106(b)(1) of the Statute.1/ In the instant case, noting the parties' stipulation that the change in starting and quitting times did not establish an additional shift or tour of duty but merely changed the existing tour of duty, and in the absence of any evidence that such change was in any manner determinative of the numbers, types or grades of employees assigned to the tour of

1/ See, e.g., Department of Transportation, Federal Aviation Administration, Washington, D.C., and its Chicago Airways Facilities Sector, supra; U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116 (1982); and National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 926 (1979).

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duty, the Authority finds that the Respondent was obligated to bargain over the change in starting and quitting times. Its refusal to do so is therefore violative of section 7116(a)(1) and (5) of the Statute.

To remedy the unfair labor practice conduct, the General Counsel and the Union have requested a status quo ante order. Additionally, but without any specificity, the Union has requested that backpay be given "to all affected inspectional personnel in the amount they would have earned in overtime pay between the hours of 5:00 p.m. and 6:00 p.m. had this violation not occurred," and also "an order requiring payment of appropriate attorney's fees."

In the Authority's view, an order which requires the Respondent to bargain with the Union, upon its request, concerning the starting and quitting times for customs inspectors assigned to the Metro Airport will best effectuate the purpose and policies of the Statute. Thus, as previously noted, the hours of the shift prior to the Respondent's change were 9:00 a.m. to 5:00 p.m. and did not include a non-paid meal period. Subsequently, the parties bargained and reached agreement over the addition of a thirty-minute non-paid meal period. This addition necessarily had the effect of altering the starting or quitting time of the existing shift. A status quo ante order which would require reinstatement of the 9:00 a.m. to 5:00 p.m. tour of duty would be inconsistent with the parties' agreement concerning the thirty-minute non-paid meal period and would not, in the Authority's view, effectuate the purposes and policies of the Statute.

With respect to the Union's request for backpay and attorney's fees, the Authority finds, as to the former, that it has not been established that but for the Respondent's improper refusal to bargain over the starting and quitting times, employees would have received overtime pay.[2/] Under these circumstances, the Authority concludes that a backpay order is not warranted. As to the request for attorney's fees, the Union has not indicated under what authority it is seeking such a remedy or in any manner demonstrated any possible basis for an award of such fees.[3/] Accordingly, the Authority finds no reason to grant such request.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby

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2/ See, Federal Aviation Administration, Northwest Mountain Region, supra, and cases cited therein.

3/ See, in this connection, International Brotherhood of Electrical Workers, 14 FLRA 680 (1984).

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orders that the Department of the Treasury, U.S. Customs Service and U.S. Customs Service, Region IX, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Instituting any change in the starting and quitting times of customs inspectors at the Metro Airport Detroit District without affording the National Treasury Employees Union, the exclusive bargaining representative of its employees, the opportunity to negotiate with respect to such change.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request of the National Treasury Employees Union, bargain concerning the starting and quitting times of customs inspectors at the Metro Airport Detroit District.

(b) Post at its facilities in the Metro Airport Detroit District copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner of Region IX, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region V, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 18, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the starting and quitting times of customs inspectors at the Metro Airport Detroit District without affording the National Treasury Employees Union, the exclusive bargaining representative of our employees, the opportunity to bargain with respect to such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the National Treasury Employees Union, bargain concerning the starting and quitting times of customs inspectors at the Metro Airport Detroit District.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority whose address is: 175 Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6306.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE, IMMIGRATION
AND NATURALIZATION SERVICE

Respondent

and

Case No. 1-CA-20126

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 38, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed. The General Counsel filed exceptions to the Judge's Decision. The Respondent filed a cross-exception and an opposition to the General Counsel's exceptions, and the General Counsel filed an opposition to the Respondent's cross-exception.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, */ the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

*/ The General Counsel filed a motion to strike certain portions of the Respondent's brief arguing, inter alia, that it refers to a document which is not a part of the record in this case. In reaching its Decision, the Authority has relied only on matters contained in the record. Accordingly, the motion to strike is denied.

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ORDER

IT IS ORDERED that the complaint in Case No. 1-CA-20126 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr. Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE Respondent and	Case No.: 1-CA-20126
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 38, AFL-CIO Charging Party	

James R. Collins and
Peter F. Dow, Esqs.
For the General Counsel

Judith Dec
For the Respondent

Frank Crowley
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 4, 1983 by the Regional Director for the Federal Labor Relations Authority (herein called the Authority), Region III, a hearing was held before the undersigned on February 28, 1983, in Boston, Massachusetts.

This case arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based upon a charge filed on February 24, 1982 by the American Federation of Government Employees, Local 38, AFL-CIO (herein called the union), against the Department of Justice, Immigration and Naturalization Service, Boston, Massachusetts (herein called the respondent).

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The Complaint alleged that respondent unilaterally changed existing conditions of employment by requiring investigators to properly update and complete the "Daily Activity Report" for the prior week before the respondent would authorize its investigators to use a government-owned vehicle during other than normal duty hours, without furnishing the union with notice and/or an opportunity to bargain concerning the alleged change and the impact and implementation of said change.

Respondent filed an Answer denying the material allegations of the Complaint as well as the commission of any unfair labor practices in violation of section 7116(a)(1) and (5) of the Statute.

All parties were represented at the hearing. Each was afforded an opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter, briefs were timely filed with the undersigned and have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence addressed at the hearing, I make the following findings and conclusions.

Findings of Fact

Respondent operates field offices throughout the United States and in several foreign countries. It administers the Immigration and Naturalization laws relating to the admission, exclusion, deportation, and naturalization of aliens; investigates alleged violations of the above laws; and patrols the borders of the United States to prevent illegal entry.

Respondent and the union are parties to a collective bargaining agreement which was in effect at all times material herein.

Mr. Thomas Doolin, is employed by respondent in its Boston District Office as a Criminal Investigator. At the time of the incident which gave rise to the unfair labor practice charge herein Mr. Doolin was about to complete a term as the union president in that office. Mr. Doolin, was at all times material herein, assigned to the investigative squad supervised by Mr. Richard Gallant.

The investigative section of the Boston District Office is divided into two squads. As previously noted, Mr. Gallant supervises one squad and the other is supervised by Mr. Robert A. Hurley.

Criminal investigators, such as Mr. Doolin conduct fraud-type investigations; general investigations which include character investigations, criminal, moral and narcotic investigations, and what is called control type investigations which involve searches for illegal aliens.

The work of the criminal investigator requires that he be in the field almost every day. The criminal investigator is assigned government-owned

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vehicles to facilitate his work. During the week, criminal investigators in the Boston District keep their assigned government car at their respective residences. In order to obtain authorization to keep the vehicle at his residence overnight the investigator must fill out a Form G-291, Request for Use of Government Owned Vehicle During Other Than Duty Hours.

The Form G-291 is generally submitted the first work day of the week. The form indicates the type of investigation being planned; the name of the subject; the file number of the subject; the hours the investigator plans to use the car; and the car number. Normally, the criminal investigator does not wait for specific approval of the Form G-291 before he leaves the office for field assignment. However, under certain circumstances for example, if an individual investigator had been involved in a recent accident with one of the vehicles, the investigator might be required to await approval.

Sometime around July 1981, respondent began requiring criminal investigators to submit a Daily Activity Report, Form G-378. The purpose of the G-378 is to provide a means of accounting for daily accomplishments. There is no connection between this form and the Form G-291. However, both forms are required to be completed as part of the criminal investigators job. Later in December 1981 respondent and the union, at the national level, executed an agreement concerning the use of the Form G-378 which provided a procedure for supervisors to counsel criminal investigators on their use of the Form G-378. The agreement provides:

> 5(a). Any written comments regarding an employees deficiencies, discrepancies or achievements relating to Form G-378 will be noted by the supervisor under the comments section discussed with the employee and initialled by the employee within a reasonable period of time after the form is submitted.
>
> 5(b). To the extent that a supervisor omits to inform an employee of such deficiency, etc., further proceedings therein will be governed by the protection set forth in Article 21 and 31 of the collective-bargaining agreement.

Articles 21 and 31 deal with derogatory material placed in an employees files and disciplinary actions, respectively.

On the morning of February 16, 1982, Mr. Doolin filled out his form G-291. Subsequently Mr. Gallant approached him and stated that he was interested in Mr. Doolin's providing additional information on his G-378's completed for the previous week ending February 12, 1982. Mr. Doolin informed him that if he wanted to make changes, he could provide Local 38 written notice of the change in accordance with the collective bargaining agreement. Mr. Gallant did not respond, but took the G-378's and placed them on Mr. Doolin's desk. Mr. Doolin removed the forms and put them on an empty desk behind his own.

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Mr. Gallant then returned to his cubicle. Mr. Doolin placed his completed G-291 on Mr. Gallant's desk. Mr. Gallant then told Mr. Doolin, "I am not going to authorize the G-291 until the G-378's are correct." Mr. Doolin responded that "they were correct". Whereupon, Mr. Gallant turned to a Mr. Timbone, who was sitting close by and said, "Did you hear that, Vinny? I am not going to authorize the 291 until the 378's are correct." Mr. Doolin again stated that they were correct. Mr. Doolin then left the office without supervisory approval of the G-291.

Testimony of other witnesses including Mr. Hurley and investigator Provencal confirm that a disagreement existed as to the correctness of Mr. Doolin's G-378. Mr. Hurley acknowledged that he overheard the heated exchange between Mr. Doolin and Mr. Gallant. Hurley testified that Gallant was using the word "correct" and Doolin was using the word "change". However, Mr. Hurley adds that Gallant said, "You will not leave the office until you correct those."

In addition to the one conversation, a note was placed on the squad sign-in sheet by Gallant around February 16, 1982 requiring that his squad "complete the G-378 for the prior week in order to get the G-291 approved." Prior to February 16, 1982 there was no such requirement for Gallant's squad. Although Gallant's squad is still required to complete the G-378 prior to approval of the G-291, Mr. Hurley has not initiated such action for his squad.

By way of explanation, Mr. Gallant testified that he had difficulty with his squad satisfactorily filling out the G-378's in that the forms were not up to date, complete and correct and that his action in February 1982 was designed to combat the problems he was having with some squad members who were continually late with their G-378's.

As earlier noted, the G-378 is a requirement of the criminal investigator's job. In addition, criminal investigators are required to complete and submit a monthly report, form G-2212. With regard to the G-2212 the evidence disclosed that if an investigator had not completed that form, he would be called back into the office to complete the task by his supervisor.

Later in the day, at around 4:30 p.m. on February 16, 1982, Mr. Doolin placed a required call to Mr. Gallant on the car radio. At that time, Mr. Gallant informed Mr. Doolin that he was "still not authorized to keep a car overnight." Mr. Doolin asked what he was to do with the car and after some rather heated conversation, Mr. Gallant refused to respond any further. Mr. Doolin did not return the car that evening and was subsequently disciplined for his actions in not returning the car. The discipline included a 30-day suspension which Mr. Doolin subsequently appealed to the Merit Systems Protection Board.

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Thereafter on February 21, 1982, Mr. Doolin filed the instant unfair labor practice charge. On the same day, Mr. Doolin requested certain information be furnished the union concerning the alleged change of February 16. Respondent replied to this request on March 1, 1982 by furnishing the requested information, but added that no negotiations were necessary.

Discussion and Conclusions

Indeed as Respondent argues, section 7106(a)(2)(A) and (B)[1]/ of the Statute clearly establishes management's right to assign work. If management has a right to assign work, which it does, it can readily be inferred that it has the concomitant right to establish priorities for such work assignment. Any restrictions or modifications, if it has the ability to set such priorities, conflicts with its right under the Statute to either assign work to a particular employee or to determine the order in which particular work would be assigned. See for example, U.S. Mint, Denver, Colorado, 3 FLRA No. 7 (1980); National Labor Relations Board, Region 19, 2 FLRA No. 98 (1980). Thus, as respondent argues, if its supervisor is unable to require investigators to perform a legitimate function, in a particular order, that supervisor's right as a manager is clearly negated contrary to section 7106(a)(2)(A) and (B).

The instant matter, in my view, was precipitated by a misunderstanding of the obligations of both parties and did not give rise to a bargaining situation. Even conceding, as the General Counsel argues, that the use of the government-owned vehicle was negotiable, there is no question of negotiability here. The real question is as respondent declares, whether or not it has the right to assign work. The corroborated record clearly discloses that Mr. Gallant's interest was in receiving completed G-378's from his squad and that on February 16, he merely wanted corrections on Mr. Doolin's G-378. Mr. Doolin obviously construed this request for correctness as a change and sought bargaining on an alleged "change". Any change about which there was an obligation to bargain is not reflected in this record. Thus, the action here appears to be purely disciplinary and, as later stated, the contractual machinery provides a method by which this

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1/ § 7106(a)(2)(A) and (B) provide in pertinent part:

> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

matter could have been resolved. Contrary to Mr. Doolin's assertion, at the time the request to bargain was made, if indeed a bargaining obligation existed, Gallant had not suggested that he would withhold authorization on the G-291, so this could not have been a subject for negotiation at that particular time. The net effect of Gallant's action was to require completion of the previous week's assignment and account for the previous week's work on the G-378 prior to commencing the next week's work. The respective obligations, as I see them, amounted to a supervisor's assigning the task of properly completing a required form to an employee before that employee proceeded with other assigned tasks. I find nothing improper about such action. Simply requiring one to complete an assignment, does not constitute a change in conditions of employment which raises a bargaining obligation.

Respondent's supervisors undoubtably have some responsibility in allowing use of government-owned vehicles, otherwise there would be no necessity for them to approve use of the vehicle overnight. The record does not disclose any change in the method of approval, but merely establishes a withholding of authorization for a reason considered valid by the supervisor. In my view, the General Counsel did not demonstrate that the criteria for approval of the G-291 was changed by this assignment. Here the supervisor merely exercised his authority to withhold use of the government-owned vehicle until all prior assignments had been completed.

Finally, the parties had previously negotiated an agreement at the national level concerning the use of the G-378 in December 1981 clearly establishing the necessity for its use. While one might not agree with the method Mr. Gallant employed to enforce the priority of submitting correct and up-to-date G-378's, it is abundantly clear that the parties by previous agreement, negotiated in December 1981, provided a means by which an individual investigator could challenge alleged deficiences found by a supervisor on the G-378 under the contractual procedures. That method, of course, did not provide for further negotiations concerning the content of G-378's, but anticipated use of the contractual procedures whenever such problems occurred. If indeed, Mr. Doolin had difficulty in correcting the G-378 as requested or if he felt that his G-378 was not deficient, the negotiated agreement supplied a method to settle such a question. Notwithstanding the previous agreement, Mr. Doolin, it appears, chose not to follow the already established procedure. Nevertheless, the use of the G-378 was agreed to by management and the union and a mechanism was provided for challenging employee deficiencies. In such circumstances, it is difficult to find an unfair labor practice violation premised on a management action designed to assure that the forms were submitted correctly and in a timely fashion. It is, therefore, found that conditioning of the approval of the G-291 on submitting a correct and complete G-378 does not constitute a change about which there is any obligation to negotiate nor does such action violate the Statute. Moreover, where such problems arose they should, in my view, be resolved as provided in the collective bargaining agreement between the parties and not by this forum.

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Likewise, I find no violation based on Mr. Gallant's notice of February 1982 requiring squad members assigned to him to turn in properly filled out G-378's before their G-291's would be authorized. As already noted, both the G-291 and G-378 are necessary, although not conditioned on each other, in order to account for an investigator's work hours and use of government property. Further the record demonstrated that Mr. Gallant had problems in obtaining from his squad G-378's submitted in a timely fashion and properly completed. Again, this notice in my opinion, merely established a priority in assignments and did not constitute a change in conditions of employment. Accordingly, it is found that the notice posted on the Gallant squad sign-in sheet around February 16, 1982 did not constitute a change in existing conditions of employment.

Based on the foregoing, it is concluded that respondent did not violate section 7116(a)(1) and (5) of the Statute by making the approval of form G-291 contingent on satisfactory submission of form G-378, but ordered a specific individual to correctly complete his own G-378 before proceeding with other assigned work which action is within management's right to assign work within the meaning of section 7106(a)(2)(A) and (B) of the Statute. For this same reason, management's posting of a notice stating that such forms should be completed, before checking out a government vehicle overnight, is also clearly within management's right to assign priorities to work. Accordingly, it is recommended that the entire complaint in this matter be dismissed.[2/]

[2/] In view of the above findings, it is unnecessary to decide whether the make whole remedy requested by the General Counsel and the Charging Party is appropriate. Assuming arguendo that a violation was found herein, it is my opinion however, such a remedy would not be precluded in this matter. Respondent argues that section 7116(d) would act as a bar. However, it is noted that the appeal filed before the Merit Systems Protection Board for employee Doolin, as an individual, would not bar the filing and processing of a matter which involved rights which run exclusively to the union i.e. whether or not respondent had failed and refused to negotiate concerning a change in working conditions. See Internal Revenue Service, Chicago, Illinois, 3 FLRA No. 75, 3 FLRA 478 (1980); Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA No. 57, 9 FLRA 480 (1982). See also, Veterans Administration Regional Office, Denver, Colorado, 7 FLRA No. 100, 7 FLRA 629 (1982). In such circumstances, were a violation found any remedy which the Authority deemed would effectuate the purposes of the Statute could be granted.

ORDER

Accordingly, it is ORDERED that the Complaint be, and it hereby is, dismissed.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: July 28, 1983
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, SEPULVEDA

Activity

and

Case No. 0-AR-834
(16 FLRA No. 12)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1697, AFL-CIO

Union

SUPPLEMENTAL ORDER DISMISSING EXCEPTIONS

On September 24, 1984, the Authority issued an Order dismissing the exceptions in the above-captioned case because, among other things, it appeared that the exceptions were filed by the grievant and that the grievant was not a party in the proceeding before the Arbitrator and, therefore, was not entitled to file the exceptions under section 2425.1(a) of the Authority's Rules and Regulations. Accordingly, and apart from other considerations, the exceptions were denied. The grievant subsequently filed a submission establishing that he was authorized to file the exceptions on behalf of the Union. Accordingly, the conclusion that the grievant was not entitled to file the exceptions is hereby reversed.

However, apart from that consideration, the Union's exceptions are otherwise procedurally deficient as untimely filed and, therefore, the Order of September 24, 1984, is hereby amended to explicitly dismiss the exceptions on that basis.

The Arbitrator's award is dated June 26, 1984, and appears to have been served on the parties by mail the same day. In the award, the Arbitrator stated that she would retain jurisdiction of the matter "in the event the grievant is found to be qualified, and the parties are unable to agree upon a remedy." By letter of August 7, 1984, the Arbitrator responded to certain communications from the parties advising them that because the Activity had determined that the grievant was not qualified for the particular position involved, she had not retained jurisdiction. The Union then filed exceptions with the Authority on August 31, 1984.

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Under section 7122(b) of the Statute, as amended,[1] and section 2425.1(b) of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.27 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on July 30, 1984. However, the Union's exceptions were not filed until August 31, 1984. Therefore, the exceptions were untimely filed.

The Union, however, in effect takes the position that its exceptions are timely because the Arbitrator retained jurisdiction of the matter, the award was not final until August 7, 1984, and the time for filing exceptions did not begin to run until that date. However, as the Arbitrator informed the parties, she did not retain jurisdiction of this matter subsequent to her award of June 26, 1984. Moreover, in arbitration cases that have come before the Authority it is not uncommon for an arbitrator to have retained jurisdiction for a period of time to resolve questions or problems that might arise concerning the award. However, retention for such purpose does not by itself serve to extend the time limits for filing exceptions. E.g., Social Security Administration and American Federation of Government Employees, Local 1164, AFL-CIO, 14 FLRA 444, n. 1 (1984); Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, 15 FLRA No. 28 (1984). Therefore, in the instant case, the time limit for filing exceptions to the Arbitrator's award began on June 28, 1984 and expired on July 30, 1984.

Accordingly, as the Union's exceptions were untimely filed on August 31, 1984, they are dismissed on that basis.

For the Authority.

Issued, Washington, D.C., March 19, 1985

Harold D. Kessler
Managing Director for Case Processing

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, §4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Activity/Petitioner

and

Case No. 3-CU-30025

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute (the Statute), a hearing was held before a hearing officer of the Authority. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon careful consideration of the entire record, including the parties' contentions, the Authority finds: The American Federation of Government Employees, AFL-CIO (AFGE) was certified as the exclusive representative for a nationwide consolidated unit of nonprofessional employees of the Social Security Administration. Essentially, the Activity's petition seeks to exclude from the bargaining unit approximately 26 Program Analysts, GS-345-13 and below, located in the Office of Field Administration, Office of Hearings and Appeals, Social Security Administration, on the grounds that they are confidential employees, management officials or employees engaged in Federal personnel work in other than a purely clerical capacity.[1/]

1/ Section 7112(b)(3) of the Statute provides in pertinent part:

> (b) A unit shall not be determined to be appropriate . . . if it includes--
>
> (3) An employee engaged in personnel work in other than a purely clerical capacity . . . .

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The Program Analysts (PA) are assigned to the Office of Field Administration (OFA), Office of Hearings and Appeals (OHA), Social Security Administration (SSA), which is responsible for directing and coordinating the administration and management activities required to support the OHA field operations. One of the major functions performed by the PAs is to visit the 135 field offices of the OHA which provide hearings on request concerning claims filed pursuant to the Social Security Act and appeal procedures for those individuals who receive an adverse decision at the hearing level, to determine whether the offices are functioning within the guidelines set by OFA. The PAs are considered by the management of OFA to be their eyes and ears. In the course of their field office visits, during which they are unsupervised and are solely responsible for their actions, the PAs perform such duties as: interviewing the entire staff at the field office in an attempt to locate problems with morale or procedures; checking the personnel structure at the field office to determine if it is functioning properly; evaluating the performance of the staff; checking the effectiveness of the collective bargaining agreement which may be in effect; evaluating the training procedures and evaluating the case flow of the field office. After the evaluation is completed, the PAs meet with the field office management and present them with their findings and suggestions for improvement. When the PAs return from a visit, they prepare a lengthy and detailed evaluation of the performance of the field office and include a list of suggestions for remedying problem areas. These evaluations are examined by the PAs' supervisors but substantive changes are rarely made. The record indicates that the suggestions found in their evaluations, such as the addition of new staff or supervisory positions, removal of employees from supervisory positions, and training to remedy problems, are routinely put into effect by management. The PAs, when they are not on field office visits, are closely involved with the monitoring of the performance of field offices and perform such duties as monitoring the case flow in the field; developing and carrying out employee and supervisory training; monitoring the performance of the field office personnel; evaluating special projects such as the National Treasury Employees Union Alternative Work Schedule and its impact on the SSA; giving technical review to all requests for awards originating from the field offices; and analyzing the effectiveness of the field office management.

Based on the foregoing, the Authority finds that the PAs are directly involved in performing personnel work affecting the bargaining unit and making recommendations to management concerning such personnel actions. Further, these personnel functions are more than routine and clerical in nature. Accordingly, the Authority finds that the Program Analysts, GS-345-13 and below, are employees engaged in Federal personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3) of the Statute and should be excluded from the unit.2/

2/ Department of Health and Human Services, Region X, Seattle, Washington, 9 FLRA 518, 524 (1982). In view of the above, the Authority finds it unnecessary to rule on whether the Program Analysts are also confidential employees or management officials.

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ORDER

IT IS ORDERED that the unit sought to be clarified be, and it hereby is, clarified by excluding from said unit the employees in the job classification Program Analyst, GS-345-13 and below.

Issued, Washington, D.C., March 20, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORTH CAROLINA AIR NATIONAL GUARD

Respondent

and

Case No. 4-CA-20010

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3001, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, granting part of the General Counsel's Motion for Summary Judgment, finding that the North Carolina Air National Guard (the Respondent) had violated the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with certain portions of a Decision and Order of the Federal Service Impasses Panel (FSIP or Panel), and recommending that the Respondent be ordered to cease and desist therefrom and take certain affirmative action. The Judge also granted part of the Respondent's Motion for Summary Judgment finding that its failure to comply with certain other portions of the FSIP's Decision did not violate the Statute. Exceptions to the Judge's Decision were filed by both the Respondent and the American Federation of Government Employees, Local 3001, AFL-CIO (the Union). The Union filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record in this case, the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

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The Judge concluded that the Respondent's failure and refusal to comply and cooperate with the final Decision and Order of the Panel, which required the parties to adopt the Union's proposal for a full scope grievance and arbitration procedure excluding only those matters specifically excluded by the Statute, constituted a violation of section 7116(a)(1) and (6) of the Statute. Subsequent to the issuance of the Judge's Decision, the Authority concluded in National Guard Bureau, Falls Church, Virginia, 16 FLRA No. 52 (1984) and in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984), that the National Guard may require that the parties' collective bargaining agreement expressly exclude actions enumerated in section 709(e) of the National Guard Technicians Act of 1968, 32 U.S.C. § 709(e) (1976)[1/] from the scope of the parties' negotiated grievance procedure. Accordingly, the Union's proposal is outside the duty to bargain under section 7117 of the Statute and the failure of the Respondent to cooperate in the final decision and order of the Federal Service Impasses Panel did not constitute a violation of section 7116(a)(1) and (6) of the Statute.[2/] The Authority therefore concludes that the allegations of the complaint in this respect must be dismissed.

The Judge concluded that the Respondent was entitled to summary judgment on the issue of its alleged failure to comply with the Panel's Decision requiring it to adopt the Union's proposal concerning the wearing of civilian attire by technicians while performing civilian technician duties. Without passing on the Judge's specific findings on this issue, the Authority agrees that no violation was committed. In the Authority's view, the issues presented are substantially similar to those set forth in the Authority's Decision and Order Upon Remand issued in Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA No. 65 (1984), petition for review filed, New York Council, Association of Civilian Technicians v. FLRA, No. 84-4128 (2d Cir. Sept. 11, 1984) wherein the Authority found that the determination by the National Guard Bureau that technicians must wear the military uniform while performing technician duties constituted management's choice of a "methods and means of performing work" within the meaning of section 7106(b)(1) of the Statute. Accordingly, based on the rationale expressed in State of New York, the Authority finds that the Union's proposal is outside the duty to bargain and that the failure of the Respondent to cooperate in the final decision and order of the Federal Service Impasses Panel did not constitute a violation of section 7116(a)(1) and (6) of the Statute. The Authority further finds that violations of section 7116(a)(5) and (8) have not been established in these circumstances.

1/ The matters enumerated in section 709(e) generally relate to the discipline and discharge of civilian technicians and include separation, removal, discharge, suspension, furlough without pay, reduction in force, and reduction in rank or compensation.

2/ Supplemental decision and order in Michigan Army National Guard, Lansing, Michigan, 11 FLRA 365 (1983), published at 14 FLRA 811 (1984).

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ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-20010 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 20, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NORTH CAROLINA AIR NATIONAL GUARD Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3001, AFL-CIO Charging Party	Case No. 4-CA-20010

Edwin M. Speas, Jr., Esquire
For the Respondent

Mr. John W. Mulholland
Ms. Deborah Loeb Bohren
Mr. Herman A. Barrier
For the Charging Party

Barbara S. Liggett, Esquire
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Four, Federal Labor Relations Authority, Atlanta, Georgia against the North Carolina Air National Guard (Respondent). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1), (5), (6), and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by failing and refusing to bargain in good faith with the Union and to comply and cooperate with a Decision and Order of the Federal Service Impasses Panel (the Panel).

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Respondent's answer denied the commission of any unfair labor practice, but admitted that it has failed to comply with the Panel's Decision and Order. Respondent raised various affirmative defenses.

Prior to a scheduled hearing, the General Counsel filed a motion for summary judgment. The Charging Party supported the motion. Thereafter, the Respondent filed an opposition to the General Counsel's motion and moved to dismiss the complaint or, alternatively, for summary judgment in its favor.1/ The parties were subsequently afforded the opportunity to, and did, file additional briefs concerning the applicability of section 7106(b).

Upon consideration of all the pleadings and exhibits, it appears that there is no genuine issue of material fact and that the General Counsel is entitled to summary judgment on the issue of Respondent's failure to comply with the Panel's Decision and Order requiring it to adopt the Union's proposals concerning grievance arbitration procedures. The Respondent is entitled to summary judgment on the issue of its alleged failure to comply with the Panel's decision requiring it to adopt the Union's proposal concerning dress and appearance standards. Accordingly, such motions are granted, and, in support thereof, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. Since on or about September 19, 1969, the American Federation of Government Employees, Local 3001, AFL-CIO (Charging Party or Union) has been the exclusive representative of the employees of Respondent in an appropriate unit of all full time, and regular part time, civilian technician personnel (Federal) employed by the agency at Douglas Municipal Airport, Charlotte, North Carolina, excluding temporary technicians and casual employees.

2. On or about October 9, 1979 the Union and Respondent commenced negotiations for an initial collective bargaining agreement. On November 18, 1980 the Union requested the assistance of the Panel to resolve an impasse which had been reached on four issues.

3. The Panel appointed a factfinder to conduct a hearing on January 13, 1981 and to make recommendations for settlement on issues concerning dress and appearance standards, grievance procedure, arbitration, and duration of the agreement. A hearing was held, and the factfinder submitted her report on March 10, 1981.

1/ See State of California National Guard, 8 FLRA No. 11 (1982) remanded, No. 82-7187 (9th Cir., Jan. 7, 1983), which established that motions for summary judgment are appropriate in unfair labor practice proceedings under the Statute.

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4. The recommendations of the factfinder were accepted by the Union, but rejected by Respondent. Respondent filed a motion to disqualify the Panel.

5. On May 26, 1981, the Panel issued its Decision and Order in Case No. 81 FSIP 21 involving Respondent and the Union. It concluded that the parties should adopt the recommendation of the factfinder. It denied the motion to disqualify and ordered the following:

> The parties shall adopt the Union's proposals concerning grievance arbitration procedures. Furthermore, the parties shall adopt the Union's proposal concerning dress and appearance standards and shall, within 60 days of receipt of the Decision and Order, negotiate (1) the components of standard civilian attire, and (2) circumstances and occasions for which the wearing of military uniforms may be required.

6. On or about June 10, 1981, Respondent submitted to the Panel a motion to reconsider requesting that the Decision and Order be set aside.

7. On or about August 3, 1981, the Panel denied Respondent's motion to reconsider.

8. On or about September 2, 1981, Respondent by Rufus L. Edmisten and Edwin M. Speas, Jr., informed the Panel in writing, with a copy to the Union, that Respondent was rejecting the Decision and Order.

9. Since on or about August 31, 1981, and at all times material herein, Respondent has failed and refused to comply with the Panel's Decision and Order.

10. On October 5, 1981, the Union filed a charge with the Authority alleging violations by Respondent of section 7116(a)(1), (5), (6), and (8) of the Statute.

Discussion and Conclusions

It is well settled that a refusal to comply with a final order of the Federal Service Impasses Panel constitutes a violation of sections 7116(a)(1) and (6). Michigan Army National Guard, Lansing, Michigan, 11 FLRA No. 74 (1983), appeal filed, No. 83-3244 (6th Cir.).

Respondent takes the position that the Panel's Decision and Order is contrary to law, and that it is under no obligation to comply with it. Respondent relies on several affirmative defenses.

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Grievance and Arbitration

With respect to the Panel's order requiring Respondent to adopt the Union's proposals concerning grievance and arbitration procedures, Respondent urges that the order is in clear violation of the authority vested in the Adjutant General under 32 U.S.C. § 709(e). Decisions of the Third and Eighth Circuit support Respondent's position. See New Jersey Air National Guard, 177th Fighter Interceptor Group and Department of Defense v. Federal Labor Relations Authority, 677 F.2d 276 (3rd Cir. 1982), cert. denied 102 S. Ct. 343 (1982); State of Nebraska, Military Department, Office of the Adjutant General and Department of Defense v. Federal Labor Relations Authority, 705 F.2d 953 (8th Cir. 1983). However, at the time of the Panel's consideration of the issue, the Authority had, and it continues to, reject this view. See Michigan Army National Guard, Lansing, Michigan, 11 FLRA No. 74 (1983), appeal filed, No. 83-3244 (6th Cir.). I am bound to follow the legal precedents of the Authority.

Accordingly, Respondent has failed and refused to comply and cooperate with the final Decision and Order of the Federal Service Impasses Panel by failing and refusing to adopt the Union's proposals concerning grievance arbitration procedures, which, according to past decisions of the Authority, are not contrary to law. By such action Respondent has violated sections 7116(a)(1) and (6) of the Statute.2/

Dress and Appearance Standards

Respondent has set forth several affirmative defenses in support of its position that the Panel's order directing it to adopt the Union's proposal regarding dress and appearance standards is contrary to law. The one I find most persuasive is Respondent's claim that the Panel "ignored" its argument that section 7106 reserves to Respondent the authority to determine its "mission" and "to determine the personnel by which agency operations shall be conducted."

The Panel adopted its factfinder's report that Respondent's assertion of nonnegotiability, based on section 7106, was "without merit." The factfinder held that she was bound by the 1977 negotiability determination of the Federal Labor Relations Council issued under Executive Order 11491, as amended, in National Association of Government Employees, Local R14-87 and Kansas National Guard, (and other cases consolidated therewith), 5 FLRC 124 (1977), reconsideration denied, 5 FLRC 336 (1977).

2/ In view of these findings, and since the following Order will provide an adequate remedy for Respondent's actions, it is unnecessary to determine whether Respondent's actions also violated sections 7116(a)(5) and (8). State of California National Guard, supra, fn. 1.

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The Statute became effective January 11, 1979, long before the parties commenced their negotiations. Pursuant to section 7105(a)(2)(E) of the Statute, the Authority is required to resolve issues relating to the duty to bargain in good faith under section 7117(c) which specifically contemplates an appeal to the Authority. The Authority has implemented this statutory imperative in Part 2424 of the Authority's Rules and Regulations. These regulations set forth the procedures for union appeals directly to the Authority from agency allegations that the duty to bargain in good faith does not extend to matters proposed to be bargained. Based on this plain language of the Statute, as implemented by the Authority's Rules and Regulations, the Authority has decided that negotiability issues which arise during impasse resolution procedures of the Panel may not be resolved by the Panel, but must be resolved through appeal to the Authority. Interpretation and Guidance, 11 FLRA No. 107 (1983), appeal filed No. 83-1518 (D.C. Cir.). The Authority has also held that an agency's allegation of nonnegotiability in its prehearing brief to the Panel can constitute an "allegation" of nonnegotiability for the purpose of filing a petition for review pursuant to Part 2424 of the Authority's Rules and Regulations. International Brotherhood of Electrical Workers, AFL-CIO, Local 121, 10 FLRA No. 39 (1982).

In view of these specific statutory and regulatory provisions for determining negotiability, the Panel should not have exercised jurisdiction over this issue by relying on a negotiability decision issued pursuant to the Executive Order. Section 7135(b) was inapplicable to this issue.3/ The Authority has not to date addressed a section 7106 claim regarding technician's attire. In view of the elaborate statutory and regulatory procedure for resolving pure negotiability disputes, it would be equally inappropriate for me to make a de novo determination of the negotiability issues at this time in the context of this unfair labor practice case for alleged refusal to comply with the Panel's order.

Inasmuch as Respondent's assertion of nonnegotiability was not properly resolved, the Panel's order requiring Respondent to adopt the Union's proposal concerning dress and appearance standards is contrary to law. Respondent did not violate the Statute by refusing to comply and cooperate with the Panel's decision in this respect.

3/ Section 7135(b) provides:

> Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 116361 11787, and 11838, or under any other Executive Order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

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In view of this disposition, it is unnecessary to address Respondent's other defenses.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the North Carolina Air National Guard shall:

1. Cease and desist from:

(a) Failing and refusing to cooperate in and comply with the Federal Service Impasses Panel's Decision and Order issued May 26, 1981 requiring it to adopt the Union's proposals concerning grievance and arbitration procedures.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply and cooperate forthwith with the Federal Service Impasses Panel's Decision and Order issued May 26, 1981 requiring it to adopt the Union's proposals concerning grievance and arbitration procedures.

(b) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Adjutant General and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region Four, Federal Labor Relations Authority, Atlanta, Georgia, in writing, within 30 days from the date of this order, as to what steps have been taken by comply herewith.

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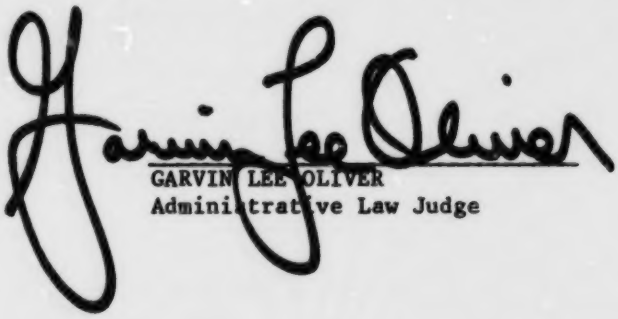
IT IS FURTHER ORDERED that the Complaint in Case No. 4-CA-20010 insofar as it alleges an unfair labor practice because of Respondent's failure to comply and cooperate with the Panel's Decision and Order requiring it to adopt the Union's proposal concerning dress and appearance standards be, and it hereby is, DISMISSED.



GARVIN LEE OLIVER
Administrative Law Judge

Dated: July 6, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to cooperate in and comply with the Federal Service Impasses Panel's Decision and Order issued May 26, 1981 requiring us to adopt the proposals of the American Federation of Government Employees, Local 3001, AFL-CIO concerning grievance and arbitration procedures.

WE WLL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply and cooperate forthwith with the Federal Service Impasses Panel's Decision and Order issued May 26, 1981 requiring us to adopt the proposals of the American Federation of Government Employees, Local 3001, AFL-CIO concerning grievance and arbitration procedures.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

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If employees have any questions concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region Four, whose address is: 1776 Peachtree Street, NW., Suite 501, North Wing, Atlanta, Georgia 30309 and whose telephone number is: (404) 881-2324.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. GOVERNMENT PRINTING OFFICE

Respondent

and

Case Nos. 3-CA-20109
3-CA-20386

COLUMBIA TYPOGRAPHICAL UNION NO. 101
INTERNATIONAL TYPOGRAPHICAL UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in certain of the unfair labor practices alleged in the consolidated complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of the consolidated complaint with respect to them. Exceptions to the Judge's Decision were filed by the Respondent.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings,[1/] conclusions[2/] and recommended Order.

1/ With respect to the Judge's finding that the impact of the training program was substantial, the Authority notes that where an agency in the exercise of a management right under section 7106 of the Statute changes conditions of employment of bargaining unit employees, a statutory duty to negotiate comes into play if the impact or reasonably foreseeable impact of the change on bargaining unit employees is more than de minimis. Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174 (1984) and U.S. Government Printing Office, 13 FLRA 203 (1983).

2/ In adopting the Judge's conclusion that Respondent violated section 7116(a)(1) and (5) of the Statute, the Authority finds that Respondent's violative conduct was limited to the unilateral change on March 1, 1982,

(Continued)

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ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Government Printing Office shall:

1. Cease and desist from:

(a) Failing to provide the Columbia Typographical Union No. 101, International Typographical Union, the exclusive representative of certain of its employees, appropriate notice of, and the opportunity to be present at, formal discussions between employees in the bargaining unit, or their representatives, and representatives of the agency, concerning personnel policies or practices or other general conditions of employment.

(b) Unilaterally changing on March 1, 1982, aspects of the existing proofreader training program without first notifying Columbia Typographical Union No. 101, International Typographical Union, the exclusive bargaining representative of said employees, and affording it the opportunity to bargain concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees affected thereby.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the Columbia Typographical Union No. 101, International Typographical Union, the exclusive representative of certain of its employees, with appropriate prior notification of, and an

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(Continued)

of certain aspects of the existing proofreader training program to deal with the special problems of the hearing impaired rather than the unilateral institution of a new program as found by the Judge.

With respect to the Judge's conclusion that the February 24, 1982 meeting, which grew out of but was not part of the previously resolved Equal Employment Opportunity complaint filed by two of the hearing impaired employees, constituted a formal discussion, compare Bureau of Government Financial Operations, Headquarters, 15 FLRA No. 87 (1984), petition for review filed, National Treasury Employees Union v. FLRA, No. 84-1493 (D.C. Cir. Oct. 1, 1984), where the Authority in finding no formal discussion concluded that a grievance within the meaning of section 7114(a)(2)(A) of the Statute does not encompass a statutory appeal.

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opportunity to be represented at, formal discussions between representatives of the agency and its bargaining unit employees or their representatives, concerning personnel policies or practices or other general conditions of employment.

(b) Notify the Columbia Typographical Union No. 101, International Typographical Union, of any intention to change the existing proofreader training program and, upon request, bargain with it concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees affected.

(c) Post at its facilities in Washington, D.C., copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the U.S. Government Printing Office, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaint in Case Nos. 3-CA-20109 and 3-CA-20386, insofar as it alleges that the exclusive representative was bypassed at the February 24, 1982 meeting in violation of section 7116(a)(1) and (5) of the Statute, be, and it hereby is, dismissed.

Issued, Washington, D.C., March 20, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to provide the Columbia Typographical Union No. 101, International Typographical Union, the exclusive representative of certain of our employees, with appropriate prior notice of, and the opportunity to be present at, formal discussions between employees in the bargaining unit, or their representatives, and representatives of the agency, concerning personnel policies or practices or other general conditions of employment.

WE WILL NOT unilaterally change the existing proofreader training program without first notifying Columbia Typographical Union No. 101, International Typographical Union, the exclusive bargaining representative of our employees, and affording it the opportunity to bargain concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide the Columbia Typographical Union No. 101, International Typographical Union, the exclusive representative of certain of our employees, with appropriate prior notification of, and an opportunity to be represented at, formal discussions between representatives of the agency and our bargaining unit employees or their representatives, concerning personnel policies or practices or other general conditions of employment.

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WE WILL notify the Columbia Typographical Union No. 101, International Typographical Union, of any intention to change the existing proofreader training program and, upon request, bargain with it concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees affected.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8456.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. GOVERNMENT PRINTING OFFICE Respondent and	Case Nos. 3-CA-20109 3-CA-20386
COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION Charging Party	

Neal Fine, Esq.
For the Respondent

Eileen Hamamara Miller, Esq.
For the General Counsel

William J. Boarman
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a second amended charge filed on April 13, 1982 in Case No. 3-CA-20109, and a first amended charge filed on May 4, 1982 in Case No. 3-CA-20386 - all by Columbia Typographical Union No. 101, International Typographical Union (herein called the Union) against U.S. Government Printing Office (herein called Respondent).

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Pursuant to an Order Consolidating Cases, Complaint and Notice of Hearing issued on July 29, 1982 by the Regional Director for the Federal Labor Relations Authority, Washington, D.C., a hearing was held before the undersigned on November 12, December 8 and 9, 1982 at Washington, D.C.

The Complaint alleged, in substance, that (a) on or about February 24, 1982 Respondent held a meeting with certain of its deaf employees, included within the bargaining unit represented by the Union, concerning an EEO complaint filed by the employees without giving the Union advance notice or an opportunity to be present; (b) on or about March 1, 1982 Respondent instituted a proofreader training employees for certain of its deaf employees, included within the aforesaid unit, without prior notice to, or negotiation with the Union. By allegedly refusing to comply with Section 7114(a)(2)(A) of the Statute and refusing to negotiate in good faith as to the impact and procedures for implementing the training program, it is averred that Respondent violated Section 7116(a)(1), (5) and (8) of the Statute.

Respondent's answer, dated August 13, 1982, denies the essential allegations in the Complaint, as aforesaid, as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examination witnesses. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the exclusive bargaining representative of all journeymen, apprentices, and trainees in the composing craft unit of the Respondent. Included within this unit are approximately 250 printer-proofreaders who read straight and tabular material and mark various typographical spelling and style errors.

2. Respondent, who employs about 800 in the bargaining unit, is responsible for printing and binding materials for Congress and various departments of the Federal Government. Day shift employees are devoted to publishing the Federal Register, whereas night shift employees are primarily concerned with the Congressional Record and bills which have been introduced.

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3. At all times since December 18, 1972 the Union and Respondent have been, and still are, parties to a "Memorandum of Understanding" which sets forth various conditions of employment, including a provision for the establishment of a Joint Training Committee to meet and consider establishing and maintaining a training program for personnel.

4. Both the Union and Respondent negotiated a "Training Program for Assignment as Printer-Proofreader" which, as GPO Instruction 625.6A, was issued on July 12, 1979. The said instruction provides, inter alia, that eligibility for training is limited to journeymen printers in the composing craft unit with at least one year's experience in the GPO; that all eligible employees will be required to demonstrate their ability to read and enunciate clearly; that the objective of the program is to give a trainee the knowledge and skills to become a printer-proofreader; that the trainee will be selected from a voluntary roster; that during the first week of training, trainees will receive 5 hours of orientation on the proper use of proofreader marks and the style manual;1/ he will be rotated to a new partner each week and his work evaluated every two weeks; the trainees will be detailed to the program for 13 weeks; tests will be administered with the Chapel Chairman acting as an observer; and those trainees failing to meet the standards will be returned to positions in their former classification.

5. Training applications follow after a superintendent or supervisor decides there is a need to train employees. A memo is written stating that a posting is required to fill a number of positions for training. Employees who see the posting and are interested in training so as to step from one job to another, i.e., linotype operator to printer-proofreader, will file a claim with the Union. Representatives of the latter confer with management, and assignments to training are made on the basis of "priority," which means seniority with GPO as a journeyman.

6. On February 2, 1981 there was a general posting at GPO for 60 proofreader positions. At this time the Union and Respondent agreed to the procedure to implement a retraining program for composing room craftsmen to advance to the said position. As a result of the posting, 60 journeymen qualified to undertake such training for this advancement on the basis of journeymen priority, i.e. seniority at GPO in that classification.

1/ This manual is a style book produced by GPO for typesetting - it sets forth type faces, sizes and indentions for all GPO work, samples of printed material, spelling, work breakage and capitalization. It is the bible for copy preparation. When a manuscript comes in for printing, the proofreader marks it so the printer or operator can read it and follow a certain style and italics.

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7. Included within the top 60 employees who applied for the training program and were on the list were seven hearing impaired employees.[2/] Since these latter individuals could not "enunciate clearly," as required by Instruction 625.6A, they were disqualified and not considered as eligible for the training program.

8. Two hearing impaired employees, William J. Stifter and Walter V. Ailstock, complained to an Equal Employment Opportunity (EEO) counselor on February 20, 1981 (prior to Respondent's amending its rule excluding deafs from training) that they were discriminated against as trainees in the Proofreader Training Program. Moreover, they stated in a memo to the counselor that they acted as spokesman for all "deaf employees in our Division concerning this matter."

9. Both Stifter and Ailstock signed a grievance, dated March 19, 1981, which was presented to Hazel Devers, Respondent's chief of EEO Counselling and Complaints, on April 1, 1981. The grievance asserted that Respondent violated the Memorandum of Understanding (Article IX, Section 2) in denying deaf employees in the composing division "a reasonable effort to maximize their skills in the printer-proofreader training program." It was also signed by Union steward Thomas Gibbs.

10. During the month of April, Devers met twice with Stifter and Ailstock to discuss the aforesaid grievance. A Union representative was present at each session. There was some discussion regarding the propriety of filing an EEO complaint at the same time that a grievance was filed under the labor-management agreement. Further, the parties talked about the training program - whether the handicapped should be allowed to enter the program. Gibbs gave Devers a list of 63 hearing impaired employees who were class members of the classification.

11. Since the grievants were not permitted to enter the training program as requested, a formal EEO complaint dated May 12, 1981 was filed by Stifter and Ailstock on behalf of all GPO deaf employees.[3/] The complaint stated, in substance, that both named employees had applied for a training program for assignment as printer-proofreader; that they were not selected for the program because of their deafness since it required they demonstrate an ability to read and enunciate clearly, which requirement automatically eliminates deaf applicants; that GPO insists

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2/ As many as 20 hearing impaired employees applied but, except for seven such individuals, they did not make the list.

3/ Sy DuBow affiliated with the National Center for Law and the Deaf, also signed the complaint as counsel for complainants.

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upon team reading for proofreaders, which excludes deaf employees; that the aforesaid requirement discriminates against deaf applicants in violation of Section 501 of the Rehabilitation Act of 1973.

12. During June and July, 1981 the parties discussed the restrictive language in Instruction 625.6A which precluded the deaf employees from entering the training program. Finally, GPO changed its position on the matter, and it decided to delete the requirement that the trainee "enunciate clearly" in order to qualify for the training program. A letter to this effect, dated August 26, 1981 was sent by Respondent to William J. Boarman, President of the Union. It was stated therein that the deletion would enable the hearing impaired to an equal opportunity to qualify as proofreaders.4/

13. In early September, 1981 DuBow asked Devers if the seven hearing impaired applicants who had been disqualified could enter the existent training program. After checking the matter, Devers advised DuBow that the program was too far along; that a new training program would be instituted in the new future and the said employees would be eligible to compete for it. DuBow said that, in view thereof, he considered the complaint closed.

14. On October 15, 1981 GPO issued an amendment to Instruction 625.6A deleting the words "and enunciate clearly" therefrom. Thus, in the Training Program for Assignment as Printer-Proofreader, the sentence was changed as follows: "they will also be required to demonstrate their ability to read." The effect of this amendment was to permit the hearing impaired employees to qualify for training to become a printer-proofreader.

15. On or about January 6, 1982[5/] DuBow called Devers. He mentioned that management had just permitted some additional employees, who were on the same roster as the one from which the deaf applicants were eliminated, to enter the ongoing training program. Devers spoke to management officials and explained this was improper and the hearing impaired applicants could reopen their EEO complaint under those circumstances. Accordingly, Respondent decided to allow the seven deaf employees, who were affected, to enter the ongoing training program.

4/ On August 28, 1981 a copy of this letter was sent from Devers to Sy DuBow and Ms. Margaret Mead, District Director, EEO Commission. In both instances Devers stated the agency deemed the EEO complaint moot and the matter resolved.

5/ Unless otherwise indicated, all dates hereinafter mentioned are in 1982.

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16. Thereafter, and during January, Devers conversed with John H. Costello, Superintendent of the Electronic Photocomposition Division. The proofreading was under the latter's supervision. Costello advised Devers that the training for the hearing impaired, who were on the night shift, would be held on the day shift. This decision was based on the fact that management wanted Mr. McArtor to be the instructor and Dick Caswell to be the interpreter for the seven deaf employees, and neither individual was available on the night shift. Further, Costello stated there would be less interruption on the day shift since training would not have to be stopped for the Congressional Record.

17. Devers relayed this information to DuBow. However, the latter told the EEO Counselor that this decision was not understood by Stifter, Ailstock or himself. Whereupon Devers suggested that employees meet with her and Costello so that the superintendent could explain in more detail why the training must be on the day shift. A meeting was arranged for February 24.

18. On February 23, Eileen Smith, a unit employee and secretary of the Chairman's Chapel for the Union, was advised by the deaf employees that a meeting was planned for the following day between management and their class representative. Whereupon Smith spoke to Costello on February 24, who confirmed the fact that a meeting was scheduled that day at 3:30 p.m. The superintendent also informed her that the Union would not be a party thereto; that the meeting was none of her business but he divulged it since others were aware of the matter. Costello explained the meeting concerned the proofreader training program for the deaf due to the EEO complaint. He indicated the hearing impaired employees were concerned about day time training, but that the instructor and interpreter were not available on night shift.

19. At 12:30 p.m. on February 24, Smith spoke to Costello again, stating that the Union had a right to be at this scheduled meeting since it was the sole negotiator for the training program. The superintendent told Smith that he contacted management who viewed the meeting as an extension of the unfair labor practice filed by Union President Boarman. Whereupon Smith replied that the Union must be notified and given an opportunity to be present.

20. The meeting on February 24 was held in Costello's office. Attendance by the deaf trainees was not mandatory. Both Stifter and Ailstock were told to appear by DuBow, and all three individuals attended. Various representatives of management,[6/] apart from Devers and

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6/ Also attending were labor relations specialist, David P. McCaughan and Drew Spaulding from the General Counsel's office.

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Costello appeared at the meeting. Another hearing impaired employee, Ralph Brewer, was present as a representative of the class, and an interpreter for the deaf also attended.

Costello advised those present that the purpose of the meeting was to plan a schedule of training for proofreading. He announced that the secretary of the Union would not be present.7/ The superintendent explained that since the Congressional Record was printed at night, it would interfere with the training program if it were held on the night shift. He informed the deaf employees that McArtor would be their instructor and that Caswell would act as the interpreter during training. Since neither individual was available at night, Costello asserted this was a further reason which necessitates holding the program on the day shift. The superintendent indicated that the training schedule of 14 weeks involved an orientation period during the first week of 1 hour per day for a total of 5 hours. Employees would be instructed as to the style manual, mark-ups, reading and proofing. They would be returned to their linotype section for 7 hours. Costello stated, further, that during the second week they would have 1 hour of class and then 7 hours of proofreader training. Since one of the seven deaf employees had dropped out of the program, Costello was asked if another such employee could be added to the training. He declined to do so, remarking there would be just six hearing impaired individuals in the program. Stifter inquired whether, after the training, they could return to the shift, and Costello stated they had a "high priority" and could do so. The superintendent mentioned that the hearing impaired employees would do silent reading.8/ Some discussion ensued regarding starting the following Monday, and Ailstock said they would have to speak with the other deaf trainees. The meeting lasted between 30-60 minutes.

21. Costello testified, and I find, that no proofreader training had been instituted in the past for hearing impaired employees. He made the decision to have 5 hours of familization in the training program, which

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7/ Both Costello and Devers testified that the superintendent asked the deaf employees at the outset of the meeting if they wanted their Union to be present; that the employees replied in the negative. Stifter and Ailstock testified Costello did not ask that question. Since the obligation of an employer, if it is found to exist under the particular circumstances, is to notify the Union in advance and allow it to attend, I find it unnecessary to resolve the conflict in these testimonies.

8/ Silent reading involves one person, i.e., the deaf employee, reading both proof and copy. Team reading, performed by hearing employees involves two persons - one holding the copy while the other reads the proof.

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is not included in the regular training program (13 weeks), and thus results in a 14 week program. This matter was never the subject of negotiation with the Union.

22. Training for the six hearing impaired employees began on March 1. They reported on the day shift with 5 hours of orientation between the first week and then the employees returned to the linotype area. In the second week they had 5 more hours of instruction and then worked in the proofroom. The remaining weeks involved training in the proofroom, but no interpreter was present.

These employees were put in an area of the proofreading room set aside from third shift employees. Each deaf trainee worked in a separate cubicle, and did silent reading. The day shift journeymen proofreader were 75-100 feet away, and said individuals did not act as partners. The nearest supervisor was located 10-15 feet from the trainees. Decisions as to the placement of the deaf trainees were made by Robert Bibeau, foreman of the day shift. He also decided the work those employees should do. No input was requested from the Union in this regard, nor did the bargaining representative participate in any negotiations concerning the location of these deaf employees, the hours of training or the details thereof.

23. During the course of the training for the deaf employees, the latter were given tests and evaluations similar to those utilized in training regular hearing employees. However, Instructor McArtor did not provide the Union with the results of such tests or evaluations, nor were they discussed with the bargaining representatives.9/ None of the deaf trainees finished the training program since they were unable to perform satisfactorily. They dropped out at the suggestion of McArtor and Bibeau.

Conclusions

It is contended by General Counsel that the meeting held on February 24 involved the EEO complaint filed by the deaf employees in May, 1981. As such, it is urged, the session was concerned with a "grievance" relating to employment as a claimed violation of a law affecting conditions of employment. Thus, under the Authority's decision in Internal Revenue Service, Fresno Service Center, Fresno, California, 7 FLRA No. 54, it is argued the aforesaid meeting held by Respondent was a "formal discussion" within the meaning of Section 7114(a)(2)(A) of the

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9/ While the Union has been allowed to be present at evaluations and tests given to regular employees, it was not afforded such opportunity herein. Respondent avers it intended to permit the Union to play the same role in respect to tests and evaluations of deaf employees.

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Statute. Having failed to give advance notice thereof to the Union, and an opportunity to be present, Respondent has allegedly run a foul of this section and thus violated Section 7116(a)(1) and (8) of the Statute.

Two more issues are raised by the General Counsel herein. It is asserted that the February 24 meeting constituted an unlawful bypass of the Union; that Respondent dealt directly with employees at this session and promised them benefits as well as negotiated the training program - all in violation of Section 7116(a)(1) and (5) of the Statute. Further, General Counsel asserts that management unilaterally changed its training program when it implemented such program for the deaf employees; that those changes resulted in a substantial and adverse impact upon unit employees; that Respondent's failure to notify the Union afforded it an opportunity to bargain regarding such changes and the implementation of the program for the deaf employees violated Section 7116(a)(1) and (5) of the Statute.

There are thus presented for determination the following issues: (1) whether the meeting on February 24 was a formal discussion within the meaning of Section 71114(a)(2)(A) of the Statute so as to require notification to the Union and an opportunity to attend thereat; (2) whether the discussion at the meeting on February 24 was tantamount to a by-passing of the Union and an attempt to bargain directly with employees in violations of Section 7116(a)(1) and (5) of the Statute; (3) whether Respondent, in implementing the training program for the deaf employees without notifying the Union and affording it an opportunity to negotiate as to its impact and implementation, violated Section 7116(a)(1) and (5) of the Statute.

(1) In disputing the claim that the meeting on February 24 constituted a formal discussion under Section 7114(a)(2)(A) of the Statute, Respondent makes two principal arguments. Firstly, it maintains the meeting was not held, as alleged in the complaint herein, to discuss the EEO complaint. There was no pending grievance or EEO matter, and since the session was held to explain why the deaf employees must be trained on the day shift, the meeting did not deal with general conditions of employment so as to constitute a formal discussion. Secondly, Respondent avers that since attendance of employees thereat was not mandatory, the key element is missing in order to characterized the discussion as "formal." It is maintained that in all prior cases, where the Authority has found such a discussion to exist, meetings were called by an employer at which attendance of employees was required.

Upon reviewing the entire record herein, I an constrained to agree with Respondent that the February 24 meeting was not arranged to discuss or consider the EEO complaint. After considering the grievance filed by the hearing impaired employees, Respondent concluded in the summer of 1981 that it would change its Instruction 625.6A and thereby permit these individuals to qualify for the training program. It so advised the Union

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President on August 28, 1981. Moreover, in January, 1982 Respondent agreed to allow the six deaf applicants to enter the ongoing program. Since the employees objected to day shift training, the meeting was set up so that Superintendent Costello could explain the necessity for running the program on the day shift. Thus it appears management wanted to clarify this aspect of the training schedule, and no attempt was made to resolve the EEO complaint or the underlying grievance. I conclude that the meeting was not undertaken to discuss the merits of the EEO matter nor to dispose of same.10/ Cf. Internal Revenue Service, Fresno et al, supra

The basis for an employer's obligation to include the bargaining representative in particular discussions involving working conditions is set forth in Section 7114 of the Statute. Pertinent language in this respect is as follows:

> Section 7114. Representation rights and duties
>
> "(a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance, or any personnel policy or practice or other general conditions of employment . . . ." (Underscoring supplied).

Respondent takes the position that the meeting on February 24 was arranged so that management could explain to DuBow - the deaf employees' counsel - the reasons for training these individuals on the day shift. Since the session was not called to deal with the employees and their

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10/ Note is taken that the complaint herein alleges the February 24 meeting concerned the EEO complaint filed by the deaf employees, and that the discussion thereat without proper notification to the Union ran counter to Section 7114(a)(2)(A) of the Statute. While I have concluded the meeting was not concerned with the EEO matter, the discussion thereat did deal with the training program for the deaf employees. Thus, I am satisfied the subject matter of the meeting "grew out" of the EEO complaint. In this posture I am satisfied that the allegation regarding the meeting is sufficient as a pleading, and that Respondent is apprised of an alleged formal discussion by management concerning working conditions, i.e., training program for the deaf, without advising the Union and affording it the opportunity to be present.

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presence was neither requested nor required, Respondent insists the meeting is not properly deemed a formal discussion under the aforesaid statutory language.

While it is true that past cases invariably dealt with meetings which employees were called upon to attend, I am not persuaded that this factor is the sine quo non for concluding that a discussion was formal in nature. Although it is a consideration, and one of several criteria set forth in Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA No. 24 (1982), the absence of mandatory attendance of employees should not be determinative as to whether a formal discussion ensued.11/ This conclusion seems warranted from a literal reading of Section 7114(a)(2)(A) of the Statute wherein it is declared that such a discussion may exist between management and its employees or their representative. It would thus appear that if employees are not called to attend such a scssion, but are duly represented thereat, an employer may not disregard the bargaining agent and deal with such representative regarding conditions of employment.

In view of the fact that no contrary conclusion in the public sector has been called to my attention - and this may well be a case of first impression - I shall conclude that a formal discussion may exist under those circumstances. Record facts disclose that the day employees were represented at the February 24 meeting by DuBow, with whom the session was arranged as their representative. Assuming, argumendo that the discussion was between management and DuBow, I am satisfied that, under the Statute, the meeting may be termed "formal."12/

In numerous cases the Authority has been called up to decide whether meetings may properly be described as involving "formal discussions" under Section 7114(a)(2)(A) of the Statute. As a guideline to such determination the Authority set forth certain criteria in Department of Health and Human Services, Social Security Administration, et al, supra. It mentioned, as relative thereto, the following:

11/ Note is taken of Judge Chaitovitz's decision in Bureau of Engraving and Printing, Case No. 3-CA-2704, OALJ-83-42 (January 14, 1983) where he concluded that all the criteria need not be met for a discussion to be "formal." In this regard, he noted the word "or" between the sixth criterion (mandatory attendance) and the seventh criterion.

12/ In view of these conclusions, I find it unnecessary to determine whether the mere presence of the deaf employees - even though not called upon to attend - warrants labeling the meeting as a formal discussion since they participated thereat and were accepted as participants.

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(a) whether the individual who held the discussions is merely a first-line supervisor or is higher in the management hierachy;

(b) whether any other management representatives attended;

(c) where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere);

(d) how long the meetings lasted;

(e) how the meetings were called (i.e., with formal advance written notice or more spontaneously and informally);

(f) whether a formal agenda was established for the meetings;

(g) whether each employee's attendance was mandatory; or

(h) the manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed).

Applying those standards to the case at bar, I am constrained to conclude that the discussions which took place at the February 24 meeting were formal in nature. The session was held by a high ranking official of Respondent in his office. As Superintendent of the Electronic Photocomposition Division, Costello was a top management representative. In attendance thereat were other agency personnel who may be described as high in the management hierachy: labor relations specialist McCaughan, and General Counsel representative Spaulding. It was not a spontaneous gathering but a planned meeting to discuss at least one aspect of the training program, and it was of considerable duration. Prescinding from the voluntary attendance on the part of the employees - which may not be critical in any event - the record reflects that the criteria set down by the Authority for a formal discussion are present herein.

Respondent insists that, in any event, the meeting on February 24 was not concerned with personnel policies or general conditions of employment which warranted union representation thereat. It contends the meeting was limited to explaining why the training for the deaf had to be scheduled for the day shift, and that the discussion had no effect upon other employees in the unit.

Contrary to Respondent's position, I am persuaded that the discussion dealt with employment conditions affecting unit employees. Although

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Costello may have intended to confine his remarks to an explanation regarding the day shift training, the record reflects that other subjects were mentioned. Thus, the superintendent also indicated who the instructor would be for the hearing impaired employees and which person would be their interpreter. Costello further stated that an orientation session of one hour per day for the first week would take place; that the deaf employees would return to their section thereafter during the first week; that the second week would involve one hour of class prior to proofreader training; that these employees would do silent reading. In response to a query from a deaf employee, Costello refused to allow another hearing impaired employee replace the seventh individual who had dropped from the training program. Upon being asked by Stifter whether the deaf employees could return to their shift thereafter, Costello indicated they could do so.

The foregoing convinces me that the meeting on February 24 was not an impromptu session, and that it was not, as argued by Respondent, a brief discussion concerning particular problems of a few employees. Cf. Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 9 FLRA No. 9. It involved unit employees and dealt with orientation of the training program for such individuals as well as other matters affecting their employment. A vital condition of employment involved the need for training the deaf on the day shift since the shift differential in pay amounted to a loss for them of 15%. Under those circumstances the Union was entitled to be notified in advance of the meeting, and should have been afforded an opportunity to attend thereat.[13/] Since it is clear that the Union was not so notified, nor given such opportunity, I conclude that Respondent did not adhere to Section 7114(a)(2)(A) of the Statute. Accordingly, I find it violated Section 7116(a)(1) and (8) thereof.

(2) An attempt was made in the public sector to describe communications between management and unit employees which may properly be characterized as a by-pass of the bargaining representative. This occurred in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80, 3 FLRC 697 (1975). The Federal Labor Relations Council declared that:

> "Comunications which, for example, amount to an attempt to by-pass the exclusive representative and bargain directly with employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order."

13/ This right inures to the union under the Statute independently of notification to the unit employees.

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Where any agency conducted a meeting with unit employees and threatened them, as well as promised benefits, the Authority has adhered to the foregoing criteria and found such conduct to amount to a by-passing of the Union. Iowa National Guard and National Guard Bureau, 8 FLRA No. 101.

However, in the case at bar, I am not persuaded that the meeting on February 24 is reflective of an intent on the part of Respondent to by-pass the Union as bargaining representative. None of Costello's remarks thereat constituted threats, or promises of benefits, to employees. The superintendent informed the deaf employees in attendance and their counsel as to some of the details regarding the training program. Further, I am not convinced that Costello was attempting to negotiate or bargain with these employees. Support for this conclusion is found in the fact that management arranged to meet with the counsel for the deaf employees. While it may be true that a formal discussion ensued, which necessitates notification to the Union an opportunity to be present, it does not follow that the communciations at the meeting required the conclusion that the bargaining representative was by-passed in violation of Section 7116(a)(5) of the Statute. See Internal Revenue Service (District, Region, National Office Unit), 11 FLRA No. 23. It is true that there were one or two questions by employees and responses by Costello regarding the training program. Nevertheless, they arose out of the explanation given by Costello as to the forthcoming training session, and they are not tantamount to an effort by Respondent to bargain with the deaf employees with respect thereto. In sum, I find that Respondent, in holding a discussion with employees and their representatives on February 24 did not by-pass the Union in violation of the Statute.

(3) It is now well established that management may not change past practices regarding working conditions without first notifying the collective bargaining representative, and affording it the opportunity to bargain regarding the impact and implementation thereof. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2. In the instant case Respondent insists a training program has existed prior to March 1, 1982; that the deaf employees - although excluded therefrom as ineligibles - were trained in accordance therewith on March 1 and thereafter; and no change occurred which required dealing with the Union.

The institution of a training program for the deaf employees constituted a change, in my opinion, in respect to those individuals. They were never the recipients of any such training, and past practice restricted the application of such program to the hearing employees. To this extent, Respondent has effected a change in the working conditions of the deaf class. See U.S. Immigration and Naturalization Service, Case

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No. 2-CA-1119, OALJ-82-127.[14] In the latter case the employer instituted a cross-training program for employees. No such training had occurred previously. It was concluded by the Administrative Law Judge that the training session were a change from past practice. Under those circumstances, management was obliged to notify the bargaining representative before it instituted the program and bargain as to its impact and implementation. Failure to do so was deemed violative of Section 7116(a)(1) and (5) of the Statute.

In the case at bar, as in the cited case, the training program was a new procedure for the involved employees. The past practice adhered to by management excluded the deaf employees therefrom. By including these employees in the program Respondent necessarily made changes in their employment conditions. Thus, it seem that they were put on the day shift, as opposed to their regular night shift operations. Further, they underwent instruction or orientation and silent proofreading during the training sessions - all part and parcel of the program made applicable to them. It is true that the establishment of a training program is non-negotiable as being an integral part of the agency's authority to assign work. See National Assocation of Air Traffic Specialists, 6 FLRA No. 101. Nevertheless, under Section 7106(b)(2) and (3) of the Statute, parties are free to negotiate the procedures for instituting a training session as well as the arrangements for employees adversely affected.[15] Likewise, the Respondent herein was, in my opinion, obliged to notify the Union in advance of the institution of the training program for the deaf employees, and to afford it the opportunity to negotiate the procedures in implementing the program as well as the arrangements for employees adversely affected.

Moreover, I am satisfied that, based on the training factors or conditions pertaining to the program, i.e., shift change, instruction period, silent reading, location of the deaf employees, and shift differential pay, the impact was substantial so as to require

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14/ In the absence of exceptions, the Authority issued an Order dated January 18, 1983 adopting the findings and conclusions of the Administrative Law Judge.

15/ A termination of a training program similarly mandates that management notify the Union, and that the latter be given an opportunity to bargain regarding the procedures to be observed in its implementation. Internal Revenue Service, (District, Region and National Office Unit and Service Center Unit), 10 FLRA No. 61.

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negotiations as aforesaid.16/ Having failed to notify the Union in advance of the institution of the training program for the deaf employees and affording it an opportunity to bargain regarding the procedures and the arrangements for adversely affected employees. I conclude Respondent has violated Section 7116(a)(1) and (5) of the Statute.

Having concluded, as aforesaid, that the Respondent by its conduct has violated Section 7116(a)(1), (5) and (8) of the Statute, I recommend the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Statute, the Authority hereby orders that the U.S. Government Printing Office shall:

1. Cease and desist from:

(a) Failing to give Columbia Typographical Union No. 101, International Typographical Union, apppropriate notice of, and the opportunity to be present at, formal discussions between employees in the bargaining unit, or their representative, and representatives of the agency concerning personnel policies or other general conditions of employment.

(b) Unilaterally instituting a training program for hearing impaired employees without first notifying Columbia Typographical Union No. 101, International Typograhical Union, the exclusive bargaining representative of said employees, and affording it the opportunity to bargain concerning the procedures to be observed in implementing such program and concerning appropriate arrangements for employees adversely affected thereby.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

16/ General Counsel also maintains these working conditions in the training program for deaf employees constituted a change in the training program as pursued for hearing employees. Since no training program was applicable to deaf persons theretofore, I do not conclude it was changed as to them. The modified conditions, under which these individuals were trained, are deemed probative as to the impact of the unilateral institution of the program for the deaf employees.

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2. Take the following affirmative actions in order to effectuate the policies of the Federal Service Labor-Management Relations Statute:

(a) Provide the Columbia Typographical Union No. 101, International Typographical Union, with appropriate prior notification of, and an opportunity to be represented at, formal discussions between representatives of the agency and its bargaining unit employees or their representative concerning personnel policies or practices or other general conditions of employment.

(b) Notify the Columbia Typographical Union No. 101, International Typographical Union, of any intention to institute a training program for hearing impaired employees, and, upon request, bargain with it concerning the procedures to be observed in implementing such program and concerning appropriate arrangements for employees adversely affected.

(c) Post at its facilities at Washington, D.C. copies of the attached notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the U.S. Government Printing Office, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken by the Director to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM NAIMARK
Administrative Law Judge

Dated: March 25, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to provide the Columbia Typographical Union No. 101, International Typographical Union, with appropriate prior notification of, and the opportunity to be present at, formal discussions between employees in the bargaining unit, or their representative, and representatives of the agency, concerning personnel policies or practices or other general conditions of employment.

WE WILL NOT unilaterally institute a training program for hearing impaired employees without first notifying Columbia Typographical Union No. 101, International Typographical Union, the exclusive bargaining representative of said employees, and affording it the opportunity to bargain concerning the procedures to be observed in implementing such program and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide the Columbia Typographical Union No. 101, International Typographical Union with appropriate prior notification of, and an opportunity to be represented at, formal discussions between representatives of the agency and its bargaining unit employees or their representative concerning personnel policies or other general conditions of employment.

WE WILL notify the Columbia Typographical Union No. 101, International Typographical Union, of any intention to institute a training program for hearing impaired employees, and, upon request, bargain with it concerning

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the procedures to be observed in implementing such program and concerning appropriate arrangements for employees adversely affected.

_____
(Agency or Activity)

DATED: _____ BY: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, NW., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8507

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEM,
FEDERAL CORRECTIONAL FACILITY,
FORT WORTH, TEXAS

Activity

and

Case No. O-AR-859

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1298, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Joe D. Woodward filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The grievant contested a three-day suspension, alleging that the suspension was motivated solely by anti-union animus. In support of this contention, the Union presented evidence of an alleged pattern of Agency harrassment of other Union officials. The Arbitrator issued the following award:

> The grievance is sustained and full restitution shall be made to the grievant for the three days lost as a result of the wrongful suspension. All documentation of said suspension should be removed from the grievant's file and the Agency is ordered to cease further harrassment of the Union officials in the discharge of their official Union responsibilities and duties.

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The Agency excepts only to that portion of the award ordering the Agency ". . . to cease further harrassment of Union officials in the discharge of their official Union responsibilities and duties." Noting that the grievance concerned only the three-day suspension of one Union official, the Agency asserts, inter alia, that the Arbitrator exceeded his authority by issuing an affirmative remedy as to other Union officials.

In response to this exception, the Union asserts that the Arbitrator acted within his broad powers to fashion remedies. Moreover, the Union argues that the issue of harassment of other Union officials was in fact before the Arbitrator. In support of this claim, the Union notes the following excerpts from the actual grievance submission:

1. The grievance included a claim that the contested suspension was issued ". . . to intimidate other union officials at this institution and its members . . ." and

2. The Union requested the following remedy: "Full restitution of three days lost on suspension, removal of all documentation, no further interference or coercion with the threat of disciplinary action in the functions of this Local and its responsibilities."

Upon careful review of the arguments and the record, the Authority finds that the award is deficient in that it exceeds the Arbitrator's authority. While it does not appear that the parties stipulated the issue, the Arbitrator stated the issue in the following limited terms: "Did the Agency violate the contract when it suspended the grievant on February 21, 1984, for three days?" While the Arbitrator considered extensive evidence of an alleged pattern of anti-union conduct, this evidence was only relevant to proving that the suspension in question was pretextual. Nor does the above cited grievance submission language bring the issue of other Union officials before the Arbitrator; indeed, the requested remedy is clearly limited to the grievant and does not request harrassment findings as to other Union officials.

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Under the facts presented, the Authority concludes that the Arbitrator exceeded his authority when he issued an affirmative order as to Union officials other than the grievant. American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Immigration and Naturalization Service, 15 FLRA No. 76 (1984). To that limited extent, the award is deficient and is modified by striking "Union official" and "their" from the award and substituting, respectively, "the grievant" and "his."*/

Issued, Washington, D.C., March 20, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision, it is not necessary to address the Agency's other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF
AGRICULTURE, PLANT PROTECTION AND
QUARANTINE, ANIMAL AND PLANT HEALTH
INSPECTION SERVICE

Respondent

and

Case No. 6-CA-1195

NATIONAL ASSOCIATION OF AGRICULTURE
EMPLOYEES, formerly THE FEDERAL PLANT
QUARANTINE INSPECTOR'S NATIONAL
ASSOCIATION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices as alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent had not engaged in certain other unfair labor practices and recommended dismissal of the complaint with respect to them. Exceptions to the Judge's Decision were filed by the General Counsel, and the Respondent filed an opposition to the General Counsel's exceptions and cross-exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order as modified herein.

The Judge found that the Respondent had discussed its intent to establish a new national policy on instream boardings of ships at ports with the Union, but that it had not given the Union notice, prior to actual implementation, as to what the policy would be or when it would be effective. The Authority, contrary to the Respondent's exceptions,

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agrees with the Judge's conclusion that the Respondent thereby violated section 7116(a)(1) and (5) of the Statute, as it had not afforded the Union the requisite prior notice of its final decision and an opportunity to bargain concerning the impact and implementation of the decision.

The Judge recommended that the Respondent be ordered to rescind its new national policy, to return to its prior discretionary policy, and to desist from implementing such changes without first affording the Union notice and an opportunity to bargain with regard to impact and implementation. The Judge found, however, that a remedy that would require the Respondent to also award backpay to employees who may have lost overtime as a result of the change is unwarranted.

Regarding the General Counsel's exception to the Judge's failure to recommend an award of backpay, the Authority has held that backpay orders in unfair labor practice proceedings must be in compliance with the Back Pay Act, 5 U.S.C. § 5596, and that to comply with the Act there must be a determination that an employee has been adversely affected by an unjustified or unwarranted personnel action and a determination that but for the improper action such employee would not have suffered a loss or reduction in pay, allowances, or differentials. Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington, 14 FLRA No. 89 (1984); Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA No. 63 (1984). In this case the request for backpay is premised on the alleged loss of overtime which the employees would have received if the instream boardings had continued. However, as found by the Judge, the Respondent had the right to implement a national policy resulting in the discontinuance of instream boardings and the General Counsel does not dispute the Respondent's right to effectuate such a decision without bargaining on the substance of its decision. The violation is not based on that decision, but on the failure to bargain over the impact and implementation of the decision, once made. Since it has not been shown that the employees would have worked overtime but for the Respondent's failure to bargain over the impact and implementation of its decision, the Authority concludes that a backpay order is not warranted.

Regarding the Judge's proposed remedy that the Respondent should be required to return to its prior policy pending completion of bargaining on impact and implementation, as found by the Judge the Respondent did give the Union advance notice of a likely change in policy and asked for comments from the Union even though the change was within its rights to make. While the employees were affected by the decision to implement a new policy, the record does not establish the nature and extent of the impact on the employees of the failure to bargain concerning the impact and implementation of the decision. The Authority has also concluded that an order to return to the prior discretionary policy with regard to instream boardings would seriously disrupt or impair the efficiency and effectiveness of the Respondent's operations. In this regard, the Respondent has persuasively argued that effective national policy favored uniformity at all ports and that a return to a situation where instream boardings resumed at some but not all ports of

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entry would be confusing and disruptive, not only of its own operations, but of commercial shipping as well. In consideration of these factors it is concluded that an order which requires the Respondent to bargain, upon request, over the impact and implementation of its decision will best effectuate the purposes and policies of the Statute. Federal Correctional Institution, 8 FLRA 604, 606 (1982). Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, 15 FLRA No. 187 (1984).

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the United States Department of Agriculture, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in the terms and conditions of employment of its employees without first notifying the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's National Association, the exclusive representative of certain of its employees, and affording the exclusive representative an opportunity to bargain concerning the impact and implementation of such changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, bargain with the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's Association, concerning the impact and implementation of its national policy regarding instream boardings.

(b) Post at its headquarters and at all facilities in each of its Regions, copies of the attached Notice to be furnished by the Federal Labor Relations Authority. Copies of said Notice shall be signed by the Deputy Administrator, Plant Protection and Quarantine, or designee(s), and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said Notices are not altered, defaced, or covered by any other material.

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(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint found to be without merit be, and they hereby are, dismissed.*/

Issued, Washington, D.C., March 21, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this dismissal, and noting particularly the absence of exceptions in this regard, we find it unnecessary to pass upon the Judge's rationale with regard to these allegations of the complaint.

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally institute changes in the terms and conditions of employment of employees without first notifying the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's Association, the exclusive representative of certain of our employees, and affording the exclusive representative an opportunity to bargain concerning the impact and implementation of such changes.

WE WILL NOT in any like or related manner interfer with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's National Association, concerning the impact on our employees of the change in our national policy with regard to instream boardings.

_____
(Agency or Activity)

Date:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, whose address is: Bryan & Ervay Streets, Room 450, P.O. Box 2640, Dallas, Texas 75221, and whose telephone number is: (214) 767-4996.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF AGRICULTURE, PLANT PROTECTION AND QUARANTINE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE Respondent and	Case No.: 6-CA-1195
NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES, formerly THE FEDERAL PLANT QUARANTINE INSPECTOR'S NATIONAL ASSOCIATION Charging Party	

James E. Dumerer, Esquire
For the General Counsel

Mr. James S. Eddy
For the Charging Party

Alice K. Barnett, Esquire.
Mr. Stanley E. Kensky
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101 et seq.,[1/] and the Final Rules and Regulations issued thereunder, 5 C.F.R.

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(1) will be referred to, simply, as "16(a)(1)."

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§2423.21, et seq., was initiated by a charge filed on May 28, 1981, alleging violations of §§16(a)(1), (5), (7) and (8) of the Statute (G.C. Exh. 1(a)). A Complaint and Notice of Hearing issued on August 4, 1981 (G.C. Exh. 1(c)), the Complaint alleging violations only of §§16(a)(1) and (5); and on October 13, 1981, an Order issued Setting Place of Hearing (G.C. Exh. 1(g)), pursuant to which a hearing was duly held before the undersigned in New Orleans, Louisiana, on October 27, 1981.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, December 1, 1981, was fixed as the date for mailing post-hearing briefs and Counsel for Respondent and for the General Counsel each timely mailed an excellent brief, received on December 3, 1981, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

The Issue

The principal issue in this case is, as set forth in Paragraph 9 of the Complaint, whether Respondent on, or about, April 17, 1981, ". . . unilaterally changed existing terms and conditions of employment in discontinuing instream ship boardings without affording the Union proper notice and an opportunity to bargain over the impact and implementation of said change." The Complaint, in Paragraph 10, alleges a further unfair labor practice as the result of an asserted breach of contract; however, as a preponderance of the evidence does not support the alleged breach of contract, this allegation will be dismissed without reaching the further question as to whether, if a breach of the contract alleged, namely a failure to "meet and discuss and attempt resolution" of any alleged unfair labor practice alleged, were shown, such breach would constitute an independent unfair labor practice.[2/]

[2/] Article XI of the parties' agreement provides:

> "The parties acknowledge the importance of resolving differences and disputes informally, at the lowest level of management. Therefore, it is agreed that prior to filing a charge of Unfair Labor Practice with the Federal Labor Relations Authority, they will adhere to the following:
>
> The party alleging a violation under Title VII, 7116, shall notify the other party, in writing, of the alleged violation and
>
> (Footnote 2 continued on page 3.)

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(Footnote 2 continued)

> the intent to file a formal charge at least ten (10) days prior to filing such a charge. The parties will meet to discuss and attempt resolution within this period of time." (Jt. Exh. 1, p. 13).

By letter dated May 3, 1981 (G.C. Exh. 3), addressed to Mr. Harvey Ford, Deputy Administrator, Mr. Eddy, President of the National Association of Agriculture Employees (hereinafter referred to as "Union") advised Respondent of its intent to file an unfair labor practice charge. Mr. Eddy's letter was received by Respondent on May 6, 1981 (Tr. 111), and was received by Mr. Robert H. Strong, then Respondent's Labor Relations Specialist (Tr. 106), on May 12, 1981. Mr. Strong credibly testified that on May 12, 1981, he called for Mr. Eddy but ended up talking to Mr. Royal E. Sharp, Vice President of the Union, and discussed ". . . placing instream boarding on the agenda since we had already scheduled a meeting of May 28 at that time to satisfy the contract provision." (Tr. 114); that on May 15, 1981, he met with Mr. Eddy on general problems and that, "I think he brought it up to discuss it, and I again suggested that we not discuss it there in my office since we had already intended on putting it on the agenda for the consultation meeting. He consented to it." (Tr. 115). The meeting scheduled for May 28 was subsequently rescheduled for June 3, 1981 (Tr. 118); "Instream boarding policy" was placed on the agenda for the June 3 meeting (Res. Exh. 3) and was discussed on June 3, 1981. The Union, however, had filed its charge, which was dated May 22, on May 28, 1981.

Not every breach of contract constitutes an unfair labor practice. General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528, 5 A/SLMR 424 (1975). A clear, flagrant and persistent breach of contract may rise to the seriousness of a unilateral change in the contract and, therefore, constitute an unfair labor practice. Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C., 7 FLRA No. 103 (1982); Watervliet Arsenal, U.S. Army Armament Command, Watervliet, New York, A/SLMR No. 726, 6 A/SLMR 526 (1976); but if there is no flagrant or patent breach constituting a unilateral change, differing and arguable interpretations of an agreement are not unfair labor practices, Food Safety and Quality Service, U.S. Department of Agriculture, Washington, D.C., supra; Watervliet Arsenal, supra; Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624, 6 A/SLMR 127 (1976). Here, of course, the record would support: a) notification by Respondent on May 12 of its desire to discuss the matter, pursuant to Article XI, at an already

(Footnote 2 continued on page 4)

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Findings and Discussion

At all times material, the Union has been recognized as the exclusive representative for all professional Plant Protection and Quarantine Officers and all non-professional employees of the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine, with certain exclusions, as more fully described in the parties current agreement (Jt. Exh. 1). Prior to April, 1981, each Plant Protection and Quarantine (PPQ) regional office had discretion to determine whether PPQ Officers would board vessels instream or to wait and board upon arrival at the dock. For many years, instream

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(Footnote 2 continued)

scheduled consultation meeting on May 28; b) a meeting on May 15, 1981, at which the intended charge was brought up by the Union and Respondent again suggested that discussion be deferred until the consultation meeting to which Mr. Eddy, President of the Union, consented. Without more, it is obvious that there was no flagrant or patent breach, indeed that there was no intent to violate Article XI in any manner. I found Mr. Strong to be a wholly credible witness, and his recollection was confirmed by the conceded addition of "Instream boarding policy" to the agenda for the consultation meeting. Accordingly, I fully credit Mr. Strong's testimony in this regard; but even if it were assumed, contrary to the affirmative testimony of Mr. Strong that "He [Mr. Eddy] consented to it", that the Union had not specifically consented to deferral of the Article XI discussion until the scheduled consultation meeting, Respondent's deferral of the discussion until the consultation meeting would not have constituted so flagrant or patent a breach of contract as to constitute an unfair labor practice, as Respondent did not demonstrate any purpose or intent to vitiate its agreement to "meet to discuss and attempt resolution" of the Union's intended unfair labor practice charge promptly, albeit not within the 10 day period.

I have reservations that a violation of Article XI by a failure to "meet to discuss and attempt resolution" within ten days would constitute a refusal to consult or negatiate, within the meaning of §16(a)(5) of the Statute, cf., U.S. Department of Defense, Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency, A/SLMR No. 211, 2 A/SLMR 512 (1972) (unfair labor practice based on alleged failure of Respondent to respond to charge as provided in Section 203.2 of the Assistant Secretary's Regulations under E.O. 11491); nevertheless, as it is unnecessary to reach or to decide this question, I express no opinion as to whether a breach of Article XI would constitute an independent violation of §16(a)(5) of the Statute.

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boarding had been a customary practice in all regions; however, the practice of instream boarding had been largely discontinued in some regions over the years and, following a death on the Delaware River in 1978 or 1979, of a Customs Officer (formerly a PPQ Inspector), routine instream boarding was generally discontinued, although each region, or even each port, pursuant to the discretionary authority granted, could, and did, determine to board some vessels instream. The ports of New Orleans and Baton Rouge, in the South Central Region, were two of the few ports where vessels continued to be boarded instream on a routine basis.

There is no doubt that Respondent, in 1980, to alleviate the disparate policies at the various ports of entry, determined that a uniform national policy was needed. Accordingly, Mr. Harvey L. Ford, Deputy Administrator, advised the Regional Directors by memorandum dated July 16, 1980, and by separate letter, dated July 16, 1980, to Mr. Eddy enclosed a copy of the memorandum to the Regional Director, and stated, in part, as follows:

> "We do not consider this a negotiable item, but I welcome your input." (Res. Exh.1).

Mr. Ford's memorandum to Regional Directors stated as follows:

> "We have recieved a request to discontinue all 'instream' boardings because of the potential safety hazards to PPQ personnel, except under extreme emergency pest-risk conditions. We plan to make a national policy decision regarding 'instream' boarding in the very near future. However, before a decision is made I would like to have your input.
>
> "May I have your comments by July 28, 1980." (Res. Exh. 1, Attachment).

Mr. Eddy testified that he never received the July 16, 1980, letter addressed to him (Tr. 49). It is evident that he did not submit any comments by July 28, 1980, as requested; but whether he received the letter, enclosing the memorandum, and I agree with Respondent's assertion (Res. Brief, n.2) that "it is evident that he did", there is no possible question that he received the memorandum to Regional Directors, if not in the mail, then at his meeting with Mr. Ford on August 22, 1980 (Jt. Exh. 2, Tr. 14-15, 17-18, 50).

Mr. Ford's memorandum to Regional Directors, dated July 16, 1980, which I find Mr. Eddy did receive and to which he responded in writing by letter dated September 2, 1980, is critical to resolution of the issue in this case. There is no doubt whatever that Respondent gave notice to the Union, not later than August 22, 1980, when Mr. Ford and Mr. Eddy met for several hours at the airport in New Orleans, of its intention to promulgate "a national policy regarding 'instream' boarding . . . ." But I do

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not find in the memorandum to Regional Directors or in Mr. Ford's testimony concerning his discussion with Mr. Eddy on August 22, 1980, any statement of what that "national policy" was to be. Plainly, as I read and understand the memoramdum, it said, "We have received a request to discontinue all 'instream' boardings"; "We plan to make a national policy decision . . ."; but ". . . before a decision is made I would like to have your input." (Res. Exh. 1, Attachment). Nor do I have any doubt, as Mr. Ford testified, that Mr. Eddy fully understood that there was going to be a change. Thus, Mr. Ford very credibly testified,

> "A. Well, the whole gist of the conversation was a preparation if I can term it that on Jim's part to convince me that a change in that policy was not in the best interest of the organization in terms of biological need. There was a quite persuasive argument in that regard. From the whole tenor of his presentation, one would gather that he understood that there was going to be a change, or that there was a proposed change -- that we intended to change that policy." (Tr. 86).

Indeed, Mr. Ford's objective, wholly consistent with his statement to Mr. Eddy that "We do not consider this a negotiable item, but I do welcome your input", was to obtain the input not only of the Union but of his Regional Directors before a national policy decision was made. Nor do I find any inconsistency in Mr. Ford's testimony, which I fully credit, that Mr. Eddy said that "overtime wasn't a consideration" (Tr. 86) in its position; or in the last sentence of Mr. Eddy's written response of September 2, 1980, that, "I feel that if there are strong unfavorable conditions brought about by any overly drastic changes that do affect working conditions, then we'll have to get together again, and do what we must do." (Jt. Exh. 2). That is, Mr. Eddy told Mr. Ford on August 22 that the Union was opposed to elimination of instream boardings for various reasons, including biological needs and the likelihood of missed vessels, and that its concern was not based on overtime considerations, and in his letter of September 2, Mr. Eddy again stated reasons for opposing any policy which eliminated instream boardings and, because the policy was yet to be determined, concluded, ". . . if there are strong unfavorable conditions brought about by any overly drastic changes . . . then we'll have to get together again. . . ."

Any possible doubt that the memorandum of July 16 represented, as of that date, Respondent's decision as to national policy regarding instream boarding is dispelled by Mr. Ford's further testimony,

> "A. Well, not only did we get the impact from the associaiton or get the letter from the association, or have a meeting with the association in which they brought up several points, but as a result of some of these things and some of the questions that the Regional Directors asked, my concern was that perhaps we might be too hasty and that the vessels that were sitting

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instream may (sic) ought to be boarded prior to -- we ought not have them sitting out there for long periods of time without boarding them. We not only had a problem that could have occurred in New Orleans, but we had vessels sitting out in the Chesapeake Bay that were not being boarded. I was concerned about those. This raised that issued at that time. I had my veterinarian begin to look into this problem as to whether perhaps rather than cutting out all instream boarding, we ought to reconsider and put some sort of a time limit on a vessel sitting without someone going on board. We talked to veterinarian services which is our sister agency and just simply took a long time to resolve that particular issue and to decide not to change but to go ahead with the way we originally intended to which was to do away with instream boardings." (Tr. 92-93).

Nevertheless, from the notice of July 16, 1980, which stated, "We plan to make a national policy decision regarding 'instream' boarding in the very near future. However, before a decision is made I would like to have your input", Respondent gave the Union no notice of what its "national policy decision regarding 'instream' boarding" was to be; nor did it give any notice, prior to actual implementation, as to when its national policy decision would be effective. To the contrary, Respondent unilaterally issued to its Regional Directors a memorandum dated April 7, 1981, which was implemented by Area III, "effective immediately" by memorandum dated April 17, 1981 (G.C. Exh. 2).

Respondent's contention that its right to make a national policy decision concerning instream boarding was not negotiable has not been questioned; nevertheless, although it was not obligated to do so, Respondent sought the views of the Union, as well as its own Regional Directors, to assist it in arriving at its policy decision. Respondent argues that because its memorandum of July 16, 1980, stated, "We have received a request to discontinue all 'instream' boardings" and inasmuch as its policy statement, dated April 7, 1981, concluded that, "all routine 'instream' ship boardings should be immediately discontinued", a fortiori, it had given notice to the Union not later than August 22, 1980, the date on which Mr. Ford and Mr. Eddy met and when, if not before, the Union received actual notice of Respondent's national policy decision. If this were true, there would considerable merit to Respondent's assertion that the Union, with ample opportunity to request impact and implementation bargaining after notice of the policy decision, had failed to do so and, if Respondent's failure to give a specific time as to when such policy was to become effective ("We plan to make a . . . decision . . . in the very near future") was not, alone, a bar, cf., Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, A/SLMR No. 909, 7 A/SLMR 844 (1977), the Union might be deemed to have waived its right to bargain. But Respondent's basic premise is false and is contrary to the record. As noted above, the July 16, 1980, memorandum neither stated, nor purported

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to state, Respondent's decision. To the contrary, the July 16, 1980, memorandum, while clearly stating that "We have received a request to discontinue all 'instream' boardings" went on to state quite plainly that, "We plan to make a national policy decision regarding 'instream' boarding . . . However, before a decision is made I would like to have your input." The entire thrust of the discussion between Mr. Ford and Mr. Eddy on this matter on August 22 was Mr. Eddy's solicited "input" as to what the policy should be concerning instream boarding which, as requested, Mr. Eddy supplemented by his written response of September 2, 1980. There can be no doubt that Mr. Eddy fully understood that discontinuance of all instream boarding was, indeed, under consideration; but it is equally clear that, while discontinuance of all instream boarding was under consideration, Respondent had made no decision as to what its policy decision would be. Certainly, Mr. Eddy confidently believed that, for reasons he stated, all instream boarding would not be discontinued; but concluded his letter of September 2, 1980, by stating that if there are "any overly drastic changes that do affect working conditions, we'll have to get together again . . . ." Mr. Ford, quite candidly, testified that,

> ". . . my concern was that perhaps we might be too hasty and that the vessels that were sitting instream may (sic) ought to be boarded prior to -- we ought not have them sitting out there for long periods of time without boarding them. . . I had my veterinarian begin to looks into this problem as to whether perhaps rather than cutting out all instream boarding, we ought to reconsider and put some sort of a time limit on a vessel sitting without someone going on board. We talked to veterinarian services . . . and just simply took a long time to resolve that particular issue . . . ."

Finally, the national policy as set forth in the memorandum of April 7, 1981, provided that, "all routine 'instream' ship boardings should be immediately discontinued except for extraordinary or emergency pest-risk situations." This statement of policy was significantly different in two respects from the "request" referred to in the July 16, 1980, memorandum: First the "request to discontinue all 'instream' boardings, became "all routine 'instream' ship boardings"; and Second, the exception in the request referred to in the July 16, 1980, memorandum, "except under extreme emergency" became, in the policy statement, "except for extraordinary or emergency". Then the policy statement of April 7, 1981, set forth examples of situations "which could be considered extraordinary or emergency pest-risk situations and could require 'instream' boarding . . . ." as follows:

> "1. Reports from the shipping line or ship's Master that live insects were found aboard.
>
> "2. Reports confirmed by the shipping line or Master or observation by a reliable source that live ruminants or swine are aboard.

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"3. Reports from maritime industry, Customs, Immigration, Coast Guard, etc., that a particular vessel is dumping garbage, and/or garbage cans are outside the rail, and/or there is an excessive accumulation of garbage to the point of falling overboard and the situation is not corrected within 48 hours through contact with the shipping line and/or ship's agent.

"'Instream' boarding is not justified on coastwise vessels reported to have had garbage violations and stores sealed at a previous port."

Of course, the above details of Respondent's "Policy on Stream, Bay, and Outside Harbor Ship Boardings", as well as provisions for documentation in writing for each "instream" boarding appeard for the first time in the policy statement of April 7, 1981, which was unilaterally implemented by Respondent, without any prior notice to the Union on, or prior to, April 17, 1981.

Conclusions

Repsondent's unilateral implementation of its policy on instream boarding, on or about April 17, 1981, without first affording the Union an opportunity to negotiate concerning the procedures which Respondent would observe in implementing the change and concerning appropriate arrangements for employees adversely affected by such change, violated §§16(a)(5) and (1) of the Statute. Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA No. 22 (1981); Department of the Treasury, Internal Revenue Service, 3 FLRA 630 (1980). As the record shows that Respondent had not made any policy decision regarding possible discontinuance of all instream boardings either on July 16, 1980, when it issued its memorandum to Regional Directors, and, which it also transmitted to the Union, or on August 22, 1980, when it met with the Union, it necessarily follows that the Union did not waive its right to bargain on impact and implementation by failing to request negotiations after notice of Respondent's July 16, 1980, memorandum. Were this conclusion wrong, I would, nevertheless, find that Respondent's unilateral issuance and implementation of its April 7, 1981, "Policy on Stream, Bay, and Outside Harbor Ship Boardings" violated §§16 (a)(5) and (1) of the Statute for the reason that its April 7, 1981, statement of policy was materially different from the "request" it gave notice, on July 16, 1980, it had under consideration, and, as Respondent did not implement, as its policy decision, such "request", Respondent was obligated to give the Union notice of its substantially different policy prior to its implementation. cf., Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center, Birmingham, Alabama, 5 FLRA No. 52 (1981). In this regard, although I am aware that the Statute, as did the Executive Order, may impose somewhat different obligations and confer somewhat different rights when a matter subject to mandatory bargaining, as distinguished from a reserved right subject only to bargaining on impact and implementation, is involved,

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nevertheless, I would apply to impact and implementation bargaining the standards imposed by the Assistant Secretary as to a change subject to mandatory bargaining, namely, that:

> ". . . the Respondent was obligated to notify the Complaintant prior to making its final determination or decision . . . ." Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, 6 A/SLMR 237, 239 (1976).

Indeed, while this was not, so far as I am aware, expressly articulated as to impact and implementation bargaining, there is no doubt that decisions of the Assistant Secretary, as to impact and implementation bargaining, consistently reached a like result, see, for example, Deparment of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 456, 5 A/SLMR 125 (1975); Jacksonville District, Internal Revenue Service, Jacksonville, Florida, A/SLMR No. 893, 7 A/SLMR 758 (1977); and more important, that decisions of the Authority have consistently reached a like result, see, by way of example, Department of Treasury, Internal Revenue Service, Jacksonville District, 3 FLRA 630 (1980); Internal Revenue Service, Washington, D.C., 4 FLRA No. 68 (1980); San Antonio Air Logistics Center (AFLC), Kelly Air Force Base. Texas, 5 FLRA No. 22 (1981). Although the impasse procedures of §19 of the Statute may not be available,[3/] which was, specifically, a reason that appropriate notice must be given as to when changes are intended to be put into effect, U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, 6 A/SLMR 339 (1976), and by inference was certainly an underlying reason that the agency was obligated to notify the union "prior to making its final determination or decision . . . .", Rosewood Warehouse, supra; nevertheless both logic and reason mandate that the exclusive representative must be notified prior an agency's implementation of its final determination or decision in order that the exclusive representative have a reasonable opportunity to request bargaining with respect to impact and implementation. Here, Respondent's final determination or decision with respect to instream boarding was materially different from the "proposal" it had under consideration initially and, certainly, areas of concern vis-a-vis impact and implementation were vastly different. For example, had Respondent discontinued all instream boarding except under extreme emergency pest-risk conditions, which proposal it initially had under consideration, concerns subject to impact and implementation bargaining would have been severely limited; but Respondent's actual policy statement was quite different as it discontinued only routine instream boardings; introduced, as a further exception, "extraordinary" situations; gave examples

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3/ No opinion is expressed or intimated as to whether §19 applies when negotiations concern solely impact and implementation inasmuch as such issue is not involved in this case.

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as to what could be considered extraordinary or emergency situations which could require instream boarding; and provided for documentation, all of which greatly broadened the areas of possible concern subject to impact and implementation bargaining. In short, while I have found that Respondent had not made its policy decision until well after August 22, 1980 - indeed, the record strongly infers that it had not made its policy decision until on or about April 7, 1981, when it issued its policy statement - and, having made no policy decision, most assuredly had not given notice of its polciy decision so as to set in motion the Union's obligation, if it desired negotiations, to request bargaining on impact and implementation. But if this conclusion were wrong, nevertheless, as previously held in Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center, Birmingham, Alabama, 5 FLRA No. 52 (1981), as Respondent did not implement the proposal it had under consideration, it was obligated to give notice of its substantially different policy decision and afford the Union a reasonable opportunity prior to its implementation to request negotiations on its impact and implementation. I find no basis in the record to support Respondent's assertion that the Union in any manner waived or abandoned its right to negotiate on impact and implementation; but if, contrary to my finding, there were any such waiver or abandonment, clearly it did not extend to Respondent's policy statement of April 7, 1981. Finally, Respondent's placing of "Instream boarding policy" on the agenda for the June 3, 1981, consultation meeting neither cured nor excused[4/] Respondent's violation of its bargaining obligation to give the Union notice of its, policy decision prior to its implementation. Jacksonville District, Internal Revenue Service, Jacksonville, Florida, A/SLMR No. 893, 7 A/SLMR 758 (1977); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981); San Antonio Air Logistice Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA No. 22 (1981); Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA No. 22(1981).

4/ In full agreement with the statement of Judge Oliver in Department of the Air Force, Scott Air Force base, Illinois, Case Nos. 5-CA-115 and 5-CA-119 (1979), adopted by the Authority, 5 FLRA No. 2, that ". . . the mere willingness . . . to receive the Union's recommendations after the announcement of a fait accompli did not cure its improper refusal to negotiate in good faith", Respondent's offer after implementation, whatever its scope, did not cure its violation; but, as noted in footnote 2, supra, it appears that Respondent acted in response to its obligation under Article XI to "meet to discuss and attempt resolution" of the Union's intended unfair labor practice charge, rather than to offer to negotiate on impact and implementation.

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Remedy

General Counsel seeks restoration of the status quo ante, including back pay for overtime lost by unit employees as a result of the violation.

In a true sense, this is not a situation where it is possible to restore the status quo. Vessels have long since come and gone. Nor would it be proper, in my opinion, to order any monetary reimbursement. First, Respondent's right, unilaterally, to make the decision to discontinue all routine instream boardings is not questioned. The Authority has made clear that negotiations on "procedures" and "impact" may not operate to prevent management from exercising rights reserved under the Statute to management. American Federation of Government Employees, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, Case No. 0-NG-20, 2 FLRA 152 (1979); National Treasury Employees Union, Case No. 0-NG-3, 2 FLRA 254 (1979); American Federation of Government Employees, Local 1712, Case No. 0-AR-104, 6 FLRA No. 85 (1981). In the Local 1712 case, supra, the Authority stated, in part as follows:

> "The Authority has also held that, while the rights of management set forth in Section 7106(a) are subject to Section 7106 (b)(2), this provision only authorizes the establishment of procedures to the extent that they do not prevent management from acting at all." (6 FLRA No. 85 at p. 468).

As Respondent had the right under §6 to discontinue all routine instream boarding, an award of backpay for asserted loss of overtime earnings would interfere with the right of management, contrary to §6, as to prevent Respondent from taking action it was, and is, authorized to take. Professional Air Traffic Controllers Organization, Case No. 0-AR-100, 5 FLRA No. 101 (1981).

Second, the loss of overtime earnings opportunity asserted did not result from the unfair labor practice alleged and found, namely the failure and refusal to give notice of the policy decision prior to its implementation to permit negotiation on impact and implementation. That is, the discontinuance of all routine instream boarding was not "an unjustified or unwarranted personnel action" within the meaning of Section 702 of the Civil Service Reform Act of 1978 which amended Section 5596(b) of Title 5, United States Code to provide for back pay in case of unfair labor practices and grievances, notwithstanding that Respondent's violation of its bargaining obligation with respect to "procedures" or "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials", constituted an unfair labor practice. cf. Defense Logistice Agency, 5 FLRA No. 21 (1981) where the Authority ordered reimbursement of "an amount equal to the dues that AFGE would have received but did not receive as a result of the unlawful refusal to honor . . . valid dues deduction authorizations."

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It is recognized that the Authority has, in appropriate cases, granted a status quo ante remedy in impact and implementation situations, San Antonio Air Logistics Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA No. 22 (1981); Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA No. 22 (1981); but is has denied a status quo ante remedy when inappropriate, General Services Administration, 6 FLRA No. 77 (1981). Under the circumstances, a status quo ante remedy would be inappropriate; however, in order to remedy the violation by Respondent of its bargaining obligation, I shall order that Respondent forthwith withdraw its memoranda of April 7 and April 17, 1981; reinstate its prior discretionary policy regarding instream boarding; that it notify the Union of any proposed change of policy regarding instream boarding; and, upon request, negotiate in good faith on the impact and implementation of any such proposed change of policy. Obviously, such order will affect the exercise of a reserved right of management, but will not prevent Respondent from acting at all; rather, Respondent will be free to act, provided only that it acts in conformance with its bargaining obligation under the Statute.

Accordingly, having found that Respondent violated §§16(a)(5) and (1) of the Statute by its unilateral implementation of its "Policy on Stream, Bay, and Outside Harbor Ship Boardings", I recommend that the Authority adopt the following:

ORDER

Pursuant to §2423.29 of the Regulations, 5 C.F.R. §2423.29, and §18 of the Statute, 5 U.S.C. §7118, the Authority hereby orders that the United States Department of Agriculture, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, shall:

1. Cease and desist from:

a) Instituting changes in the established discretionary policy regarding instream boarding without first notifying the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's National Association, the exclusive representative of its employees, and affording such representative the opportunity to negotiate in good faith, to the extent consonant with law, regulations and the Statute, with regard to the impact and implementation of such change.

b) In any like or related manner, interfering with, restraining, or coercing its employees in the rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute.

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a) Rescind and withdraw the "Policy on Stream, Bay, and Outside Harbor Ship Boardings" unilaterally implemented by memoranda dated April 7 and April 17, 1981.

b) Reinstate the discretionary policy concerning instream boardings as it existed prior to April 7, 1981.

c) Notify the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's National Association, of any proposed change of policy regarding instream boarding and, upon request, negotiate with such representative, to the extent consonant with law and regulations, concerning the impact and implementation of such change.

d) Post at its headquarters and at all facilities in each Region, copies of the attached notice marked "Appendix", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Deputy Administrator, Plant Protection and Quarantine, and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Deputy Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

e) Notify the Regional Director of the Federal Labor Relations Authority for Region VI, whose address is: P.O. Box 2640, Dallas, Texas, 75221, in writing, within 30 days from the date of this Order, what steps have been taken to comply therewith.

William B. Devaney

WILLIAM B. DEVANEY
Admininstrative Law Judge

Dated: March 10, 1982
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the discretionary policy regarding instream boarding without first notifying the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's National Association, the exclusive representative of our employees and affording it the opportunity to negotiate, to the extent consonant with law and regulations, concerning the impact and implementation of such change.

WE WILL rescind and withdraw the "Policy on Stream, Bay, and Outside Harbor Ship Boardings", which we unilaterally implemented by memoranda dated April 7, 1981, and April 17, 1981.

WE WILL reinstate the discretionary policy concerning instream boardings as it existed prior to April 7, 1981.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Association of Agriculture Employees, formerly the Federal Plant Quarantine Inspector's National Association, of any intended change of policy regarding instream boarding and, upon request, negotiate, to the extent consonant with law and regulations, on the impact and implementation of such change.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: Federal Labor Relations Authority, Region VI, P.O. Box 2640, Dallas, Texas, 75221, and whose telephone number is: (214) 767-4996.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C.

Respondent

and

Case No. 2-CA-20154

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2849, AFL-CIO

Charging Party/Union

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the stipulation of facts and accompanying exhibits, and the contentions of the parties, the Authority finds:

The complaint herein alleges that based upon Authority law as it existed in 1981, at the time of the probative facts in this case, the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when the Agency head, pursuant to section 7114(c) of the Statute, disapproved a provision of an agreement negotiated between the Charging Party and Respondent's Eastern Region. This provision had provided:

> Article III Section C paragraph 3:
>
> If at any time Management holds a discussion with an employee and the employee reasonably believes the matter may lead to disciplinary action, he/she has the right to speak or remain silent and to refuse to give a written statement except in matters connected with investigations and inquiries into the integrity or effectiveness of the Merit System covered by Civil Service Rule 5.4.

The Authority finds that the provision set forth in Article III, Section C paragraph 3 is essentially the same as that which was presented in Tidewater Virginia Federal Employees Metal Trades Council and Navy

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Public Works Center, Norfolk, Virginia, 15 FLRA No. 73 (1984) and American Federation of Government Employees, Local 1812, AFL-CIO and United States Information Agency, 16 FLRA No. 48 (1984). In these cases the Authority, in agreement with a 1982 decision of the 9th Circuit Court of Appeals,[1/] found that a proposed contract provision concerning an employee's right to remain silent during any discussion with management in which the employee believed disciplinary action may be taken against him or her was outside the duty to bargain, as the provision prevented management from acting at all with regard to its substantive rights under section 7106(a)(2)(A) and (B) of the Statute to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance.

Based on the above cases and the rationale contained therein, the Authority concludes that the provision involved in this case is outside the duty to bargain. It follows that the Respondent's refusal to approve the specified provision of the collective bargaining agreement did not constitute a failure or refusal to negotiate in good faith, in violation of section 7116(a)(1) and (5) of the Statute.[2/]

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-20154 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 21, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

1/ See Navy Public Works Center, Pearl Harbor, Honolulu, Hawaii v. Federal Labor Relations Authority, 678 F.2d 97 (9th Cir. 1982), denying enforcement of International Brotherhood of Electrical Workers, AFL-CIO, Local 1186 and Navy Public Works Center, Honolulu, Hawaii, 4 FLRA 217 (1980).

2/ In so ruling, the Authority notes that the disputed provision was similar to proposals held negotiable by the Authority prior to Navy Public Works, supra. While an agency acts at its peril when it refuses to negotiate under those circumstances, the Authority will not find an unfair labor practice where subsequently established law supports the agency position.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
U.S. MARSHALS SERVICE

Respondent

and

Case No. 2-CA-40016

INTERNATIONAL COUNCIL OF DEPUTY
U.S. MARSHALS LOCALS, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 2827

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and the Respondent filed an opposition to the General Counsel's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-40016 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 21, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE Respondent and INTERNATIONAL COUNCIL OF DEPUTY U.S. MARSHALS LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2827 Charging Party	Case No. 2-CA-40016

James G. Bennett, Esq.
Ronald R. Frazee, Esq.
For the Respondent

Robert J. Fabii, Esq.
Barbara S. Liggett, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Managaement Relations Statute (herein called the Statute). It is based on a first amended charge filed on November 22, 1983 by International Council of Deputy U.S. Marshals Locals, American Federation of Government Employees, Local 2827, (herein called the Union) against the U.S. Department of Justice, U.S. Marshals Office (herein called the Respondent).

A Complaint and Notice of Hearing was issued on December 28, 1983 by the Acting Regional Director for the Federal Labor Relations Authority, Region II. The said Complaint alleged, in substance, that on or about October 3, 1983 Respondent suggested to employees they would be

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scrutinized more closely re their telephone usage and promptness in reporting for duty; that such suggestion was made as a result of the Union President's exercise of protected activity - all in violation of Section 7116(a)(1) of the Statute.

Respondent filed an Answer dated January 20, 1984 which denied the aforesaid allegations as well as the commission of any unfair labor practices.

A hearing was held before the undersigned on February 7, 1984 at Philadelphia, Pennsylvania. All parties were represented thereat. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter briefs were filed which have been duly considered.1/

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make following findings and conclusions:

Findings of Fact

1. At all times material herein, the American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals has been, and still is, the exclusive bargaining representative of Respondent's nonprofessional employees worldwide, including intermittent and term deputies and excluding certain employees not relevant herein.

2. Both Respondent and American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals are parties to a collective bargaining agreement. The said agreement, by its terms, became effective on January 29, 1982 and remains in full force and effect thereafter for a three year period.

3. At all times material herein, American Federation of Government Employees, Local 2827 (herein called the Union) has acted as the agent of American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals, regarding collective bargaining and other labor relations matters affecting employees at Respondent's Camden New Jersey location.

1/ Subsequent to the hearing the General Counsel filed with the undersigned a Motion to Correct Transcript. No objection having been interposed thereto, and it appearing that the corrections are proper, the motion is granted. The transcript is hereby corrected as reflected in the Appendix which is annexed to this decision.

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4. On September 3, 1983 Starlord Pickett, Acting President of the Union[2] and a Deputy U.S. Marshal employed at the Camden, New Jersey Office, filed a step one grievance on behalf of the Union with Eugene Liss, U.S. Marshal for the District of New Jersey. In this written grievance Pickett stated that Liss had made "various changes" in working conditions without notifying the Union or giving it an opportunity to negotiate the changes - all in violation of Article XXXI of the Master Agreement. Pickett requested that Liss discuss this grievance as required under Article XXV of the said Agreement.

5. In a letter dated September 9, 1983[3] Liss wrote Pickett acknowledging receipt of the step one grievance. The Marshal stated that the letter-grievance filed by Pickett did not set forth specifics and Liss had no idea of the Union's particular complaint. Liss requested that Pickett mention specific contractual violative acts with attending dates.

6. By letter dated September 19 Pickett filed a step two grievance, addressed to Liss, wherein he enumerated the changes unilaterally instituted by the Marshal. These changes did not include, or make mention of, the usage of FTS telephones by employees in the Camden office, or the charging of leave to a Camden employee if he returned late from lunch or reported late to work.[4]

7. Several days after September 19 Liss called Leon Cunningham, Supervisory Deputy Marshal at Camden, New Jersey. The Marshal notified Cunningham he would be in Camden on October 4. He also told the supervisor to have Pickett available to discuss a grievance which the Union official filed against Liss.[5]

2/ Pickett also served as Regional Vice-President of the International Council of U.S. Marshals and as regional representative for the national union.

3/ Unless otherwise indicated, all dates hereinafter mentioned occur in 1983.

4/ There were 9 alleged changes by Liss of which Pickett complained. They included such items as: rotating Newark Deputies but not others; changing method of transporting prisoners which affected overtime for Trenton and Camden Deputies; changing mileage calculations to detriment of Trenton Deputies; reprisal against a union official for seeking to file a grievance.

5/ Pickett testified he always sent a copy to Cunningham of any correspondence to Liss. Thus it is contended the supervisor was aware of Pickett's grievance. On the state of the record, and in view of Cunningham's denial that he received the grievance, there is insufficient proof that the specifics of the grievance were known to the supervisor.

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8. On October 4 Marshal Liss visited the Camden office and conferred for a short time with Pickett. Both individuals discussed the matters mentioned in the step two grievance letter. No reference was made by either person as to the usage of FTS telephones by Camden employees, or the charging of leave to Camden employees if they returned late from lunch or reported late to work.

9. Following the conversation with Pickett, and on the same day, Liss conferred with Cunningham. The Marshal testified he was concerned about the usage of telephones at Camden; that it was difficult to communicate between headquarters and Trenton due to the fact that the Camden phones were continually in use. Liss told Cunningham that the excessive usage was difficult to understand since there was not much warranty work being undertaken; that the public, as well as some attorneys, complained they couldn't communicate with the Camden office. Liss told the supervisor to "get tough with his phones" and to supervise them. The Marshal also advised Cunningham that the latter could interrupt a lengthy phone conversation to ascertain if it was official business being discussed. The reference was made by Liss, during their discussion, as to charging leave if employees reported late to work or after lunch. Liss did not mention that Pickett had filed a grievance or refer to it.

10. On October 6, Cunningham called a meeting of his deputies.6/ Attending thereat were Pickett, William Gunning, Barry Frost, and Boston Bennett - all deputies attached to the Camden office. The supervisor stated7/ that there had been complaints regarding the operation of the office; that someone gave information to the Marshal that the Camden office was being run in a loose manner. He also referred to having met with Liss on the previous day; that the Marshal had met with one of the deputies, but the name of the deputy was not mentioned. Cunningham mentioned that while the office was being run satisfactorily, certain rules needed to be enforced and it was necessary to tighten procedures. He indicated that warrant files should be kept accessible in the event a deputy was not on hand; that the deputies should observe the chain of command and advise him if they want to talk to the Marshal. Cunningham referred to the fact that the hours were from 8:30 a.m. to 5:00 p.m. and if a deputy reported late he would have to take leave. The supervisor commented he came in at 8:30 and was not asking the deputies to do anything unusual. He mentioned that one-half hour was allotted for lunch

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6/ Those in attendance at this meeting testified to different versions of what was said thereat. The findings herein represent the credited version of remarks by Cunningham.

7/ Record facts reflect Cunningham calls periodic staff meetings, and that he has held 3 or 4 meeting with his deputies during the past 18 months.

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and if a deputy exceeded that time, he must put in a leave slip. Cunningham also told the deputies that phones must be used only for official business; that the calls should be kept short and limited to about three minutes. He suggested that it may be necessary to monitor phone calls where the usage is excessive.8/

11. The record reflects that subsequent to the meeting on October 5 Cunningham monitored some of the phone calls in the Camden office, and that this practice has continued.

Conclusions

General Counsel maintains that, based on the statements made by Supervisor Cunningham to the deputies on October 5, Respondent violated Section 7116(a)(1) of the Statute. It is contended that the supervisor suggested to the employees he intended to restrict the use of telephones, as well as charge the deputies leave if late for work or upon returning from lunch, because Pickett had met with Marshal Liss re a grievance filed by the union official.

Management is proscribed, under Section 7116(a)(1) from interfering with, retraining, or coercing its employees in the exercise of rights assured by the Statute. It is quite clear that included within such protective activity is the filing of grievances. See United States Department of Interior, Office of the Secretary, U.S. Controller for the Virgin Islands, 11 FLRA No. 91. In determining whether statements by management re the filing of grievances by employees tends to interfere with such protected activity, certain standards must be considered. Thus, it does not suffice to consider subjective perceptions or reactions by employees. By the same token, the intent of the employer is not the test in deciding whether statements constitute interference. The decisive factor is whether, under the circumstances, an employee may reasonably infer intimidation or coercion based on management's remarks. The essential query is whether such statements tended to interfere, coerce or restrain employees. Federal Mediation and Conciliation Service, 9 FLRA No. 3.

Careful consideration of the record herein convinces me that, contrary to General Counsel's assertions, Cunningham did not suggest to the deputies on October 5 that he was instituting changes because Pickett had filed a grievance or met with Marshal Liss in respect thereto. While it is true that the supervisor knew that Deputy Pickett had filed a grievance

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8/ Although Pickett testified Cunningham looked at him during the meeting, other deputies testified that the supervisor's remarks were directed at all in attendance.

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and had met with Liss on October 4, the record does not support a reasonable inference that Cunningham announced there would be closer scrutinizing of working conditions based on Pickett's activities in that regard. Despite the artful and well expressed urgings of the General Counsel, I am constrained to conclude that the deputies could not reasonably draw such an inference.

While it is true that Cunningham knew that Liss met with Pickett on October 4 re a grievance, the complaints lodged by the union official therein pertained to conduct - or the lack thereof - by Liss as Marshal and head of the New Jersey District. There was no accusation or criticism leveled by Pickett against his immediate supervisor. Further, Liss made no reference to the specifics of the grievance, nor was he unduly critical of the Camden office, when he spoke to Cunningham on October 4. The Marshal did not upbraid the supervisor in any severe manner but was concerned about the excessive use of the telephones by the deputies. In respect to the latter, he directed that Cunningham take some action to restrict such usage. Under the circumstances, it is difficult to abide by General Counsel's theory that the supervisor informed the men there would be closer scrutinizing because of Pickett's grievance. Although it does not avail one to speculate re the motive for Cunningham's actions, it seems reasonable to conclude, based on the record herein, that he was tightening the reins pursuant to the command of Marshal Liss on the previous day. None of the evidence supports a conclusion that Cunningham did become stringent in enforcing the rules as a result of Pickett's activity.

In meeting with the deputies on October 5, the supervisor made no reference to Pickett on his filing a grievance which in anyway reflected adversely upon the Camden office. No adverse inference may be properly drawn against Respondent based on Pickett's testimony that Cunningham looked at him during the meeting. The deputies who testified herein attest to the fact that Cunningham spoke to all of them and did not direct his remarks to anyone person. No reference was made to any union or protected activity on the part of Pickett or other employee. The state of the record persuades me that the supervisor of the deputies was sensitive to the criticism expressed by Liss; that he sought to respond thereto by limiting the usage of phones, and also insisted there be no tardiness after lunch breaks or upon reporting for work - all of which constituted adherence to proper procedures.

In sum, I conclude that Cunningham's remarks to the deputies on October 5 contained no coercive statements and no threats of interference with their protected rights under the Statute. Moreover, the record herein does not, in my opinion, warrant the inference that the supervisor's comments on October 5 - including his insistence upon limited usage of the telephones and reporting on time for work or upon returning from lunch - were made as a result of Pickett's filing a grievance with the Marshal concerning other working conditions. Having concluded that

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Cunningham's statements on October 5 did not tend to interfere, restrain or coerce the deputies, I conclude Respondent did not violate Section 7116(a)(1) of the Statute as alleged. Accordingly, it is recommended that the complaint be dismissed in its entirety.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: November 15, 1984
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL 1245

Union

and

Case No. O-NG-941

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
MID-PACIFIC REGIONAL OFFICE

Agency

ORDER DISMISSING PETITION FOR REVIEW

This matter is before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of a negotiability issue filed by the Union. For the reason indicated below, the Union's petition for review must be dismissed.

It appears from the Union's petition that the Union sought to meet with the Agency to negotiate over Reclamation Instruction 365, Motor Vehicles and Heavy Equipment.*/ The Union did not, however, submit any specific proposals for negotiation. The Agency's assistant regional director for administration responded by informing the Union that the instruction was not negotiable and, that in any event, the Union had not requested bargaining within the thirty day time limit after the instruction's issuance as per the parties' negotiated agreement. Thus, the Agency denied the Union's request to bargain. In response to a subsequent memorandum from the Union requesting clarification on the issue

*/ The Union did not provide a copy of Reclamation Instruction 365 to the Authority in connection with the instant Petition.

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of whether a compelling need existed for this instruction, the Agency notified the Union that in light of its prior determination the issue of compelling need for the instruction was moot. The Union thereupon filed the instant petition with the Authority.

Section 2424.1 of the Authority's Rules and Regulations, which implements section 7117 of the Statute, provides, in pertinent part:

> § 2424.1 Conditions governing review
>
> The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117(b) and (c), namely: If an agency involve in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority . . . . .

Further, it is well-established that a petition for review of a negotiability issue which does not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision thereon does not meet the conditions for review set forth in section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations. See, e.g., Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, 2 FLRA 314 (1979)

Thus, the conditions governing review of a negotiability issue include a requirement that there be "a matter proposed to be bargained," and that the proposal must be specific in form and content so as to enable the Authority to determine whether the proposal is negotiable under the Statute. See e.g., Federal Employees Metal Trades Council and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 10 FLRA 407 (1982).

In this case, the dispute between the parties is not sufficiently delineated to form a basis for a negotiability determination by the Authority. As stated above, while the Union may have sought to negotiate with the Agency concerning the instruction, it did not propose any specific language for a negotiation. It is therefore clear, that apart from other considerations, the Union's petition for review was prematurely filed and does not meet the conditions for review set forth in section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations and must be dismissed.

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Accordingly, IT IS HEREBY ORDERED that the instant petition for review be dismissed.

For the Authority.

Issued, Washington, D.C., March 22, 1985

Harold D. Kessler,
Director, Case Management

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

CORPS OF ENGINEERS,
U.S. ARMY ENGINEER DISTRICT,
NEW ORLEANS, LOUISIANA

Activity

and

Case No. 0-AR-673

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1124

Union

DECISION

This matter is before the Authority on exceptions to a clarified award of Arbitrator John F. Caraway filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter concerns the Arbitrator's clarification of his award. The issue submitted to arbitration was whether there was just cause for the Activity's suspension of the grievant for two days for disruptive conduct. The Arbitrator determined that there were mitigating circumstances involved and concluded that while the Activity did not have just cause to suspend the grievant, it had just cause to issue a "letter of warning" for the misconduct. The Arbitrator therefore essentially directed the Activity to rescind the suspension and place a "letter of warning" in the grievant's official personnel folder (OPF). The Activity subsequently requested the Arbitrator to clarify the intent of his award, pointing out that under the pertinent provision of the parties' agreement, a "letter of warning" could not be placed in an employee's OPF and that a "letter of reprimand" could be so filed. In reply, the Arbitrator advised the parties that the intent of his award was that a "letter of reprimand" be issued and placed in the grievant's personnel folder.

In its first two exceptions, the Union contends that the Arbitrator's award as clarified is contrary to law and the parties' agreement

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and that the Arbitrator exceeded his authority. More specifically, the Union argues that under sections 7121 and 7122 of the Statute and a corresponding provision of the agreement, the Arbitrator's award was final when issued, subject only to subsequent action by the Authority upon the filing of exceptions by a party to the case, and, therefore, that the Arbitrator was without authority to clarify the award once it was issued. However, the Authority concludes that the Union has failed to establish that the Arbitrator's award as clarified is deficient as alleged. Neither section 7121 nor section 7122 prohibits the correction or clarification of an award by an arbitrator subsequent to its issuance. Additionally, the Union has failed to establish that there was any express limitation in the parties' collective bargaining agreement, or in any other formal agreement such as a grievance submission agreement, on the authority of the Arbitrator to clarify the intent of his award after it was issued. Moreover, contrary to the Union's assertions, an arbitrator's authority is not always immediately terminated upon issuance of an award. Rather, it is generally recognized that an arbitrator has the authority to correct or clarify an award in a number of circumstances. See Audie L. Murphy Veterans Administration Hospital, San Antonio, Texas and American Federation of Government Employees, AFL-CIO, Local 3511, 15 FLRA No. 60 (1984); La Vale Plaza, Inc., v. R.S. Noonan, Inc., 378 F.2d 569 (3rd Cir. 1967); O. Fairweather, Practice and Procedure in Labor Arbitration, 579-83 (2d ed. 1983).

In its third exception, the Union argues that it was denied a fair hearing and that the Arbitrator was biased in favor of management in the clarification process. However, the Authority concludes that the Union has failed to substantiate that it was denied a fair hearing or that the Arbitrator was biased in this case. Thus, the Union has failed to establish that the Activity's request for clarification of the remedy it was directed to implement was in any way improper or that the Arbitrator's clarification resulted in any prejudice to any rights of the Union in this matter. It is clear that the Arbitrator's clarification conforms to his originally expressed intent to document the grievant's misconduct in her personnel folder and that the award as clarified was based on the testimony and evidence presented by the parties prior to the clarification. Consequently, the Union's assertions in support of this exception provide no basis for finding the clarified award deficient. E.g., Veterans Administration and American Federation of Government Employees, Local 997, 8 FLRA 238 (1982).

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In its fourth exception, the Union alleges that the Arbitrator's clarification was untimely because it was issued after the date assigned by the American Arbitration Association for the issuance of an award in this matter. However, it is clear that the award was rendered before the assigned date. Moreover, even assuming that the date was also applicable to any post-award clarification, the Union's exception provides no basis for finding an award deficient under section 7122(a) of the Statute. Social Security Administration and American Federation of Government Employees, Local 1923, AFL-CIO, 7 FLRA 544, 547 (1982). See also, Fairweather, supra, at 569-70, 621-23.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 26, 1985

Henry B. Frazier, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 615

Union

and

Case No. O-NG-761

NATIONAL PARK SERVICE,
SEQUOIA AND KINGS CANYON
NATIONAL PARKS, U. S. DEPARTMENT
OF INTERIOR

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of two provisions of a negotiated agreement which were disapproved by the Agency head pursuant to section 7114(c) of the Statute. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Provision 1

1. Article XII, Section 8:

A. In the interest of effective employee utilization, details to positions or work assignments requiring higher or different skills will be based upon bonafide needs and will be consonant with the spirit and intent of this Article, applicable regulations and the merit system. Details may be used to meet emergency situations, or situations occasioned by abnormal workload, changes in mission or organization, or absences of personnel.

. . . . . .

C. The detail into a higher level or different line of work procedure shall not be utilized to afford certain employees an undue opportunity to gain qualifying experience or to prevent others from gaining such experience.

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Subsection A of Provision 1 expressly limits management's ability to assign specified types of work to bargaining unit employees to certain prescribed circumstances. That is, employees may only be assigned work requiring higher level or different skills in the listed situations. In this regard, subsection A is to the same effect as the proposal, limiting the assignment of "non-nursing functions" to nurses only to "urgent or needful situations," which was before the Authority in New York State Nurses Association and Veterans Administration Medical Center, Bronx, New York, 11 FLRA 578 (1983). In that case the Authority found the proposal to be inconsistent with the management right, pursuant to section 7106(a)(2)(B) of the Statute, "to assign work." Hence, based on Veterans Administration Medical Center, Bronx, and the reasons and case cited therein, subsection A of Provision 1 is outside the duty to bargain.

As to the Union's contention that subsection A of Provision 1 is merely intended to require management's compliance with provisions of the Federal Personnel Manual (FPM) governing details, the Authority notes that subsection A does not reflect the limitations imposed by subchapter 8 of FPM chapter 300 upon management's use of details. In this regard, subsection A requires that details be limited to "emergency situations" and several other described circumstances. The FPM, however, in addition to "emergency details,"[1/] provides for the use of details in other circumstances. Specifically, details may be used pending official assignment, pending description and classification of a new position, pending security clearance, and for training purposes, especially where the training is part of an established plan.[2/] Consequently, subsection A of Provision 1 imposes stricter limitations on management's ability to detail employees than those prescribed by the FPM.

Contrary to the Agency's view, subsection C of Provision 1 is not inconsistent with its right "to assign."[3/] Rather, the Union asserts with regard to this disputed subsection:

1/ FPM chapter 300.8-3.a provides:

> (1) Emergency details. To meet emergencies occasioned by abnormal workload, special projects or studies, change in mission or organization, or unanticipated absences.

Subsection A, therefore, would effectively limit details only to most, but not all, of the situations defined as emergencies by the governing FPM.

2/ FPM chapter 300.8-3a(2).

3/ Presumably, the Agency's use of this term is intended to convey that subsection C of Provision 1 is inconsistent with its rights, pursuant to section 7106(a)(2)(A) and (B) of the Statute to assign employees and to assign work. However, the assertion of either or both of those management rights does not alter the Authority's determination with respect to subsection C.

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> The Union acknowledges that management has the right to select employees for details based on "the unique skills and personal attributes appropriate for such a detail." We seek only to prevent undue advantage for some employees.[4/] [Footnote added.]

Further, the Union contends that subsection C is intended to prevent the prohibited personnel practices enumerated in 5 U.S.C. 2302(b)(6).[5/] Thus, in view of the Union's explanation of subsection C, which is consistent with its plain language, the Authority concludes that this subsection does not restrain management's ability to detail. Rather, the subsection is negotiable because it establishes a general, nonquantitative requirement by which management's exercise of its right to assign work could subsequently be evaluated in a grievance proceeding brought by an employee who believes he or she has been adversely affected by the exercise of that right. In American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and U.S. Department of Justice, U.S. Marshals Service, 8 FLRA 268 (1982), Union Proposal 5, prohibiting assigning employees as a reward or penalty or effecting such assignments in an arbitrary or capricious manner, was found by the Authority to constitute a general, nonquantitative requirement and was determined to be negotiable. In like manner, subsection C herein constitutes a procedure, within the meaning of section 7106(b)(2) of the Statute, to be followed by management in exercising its right to assign employees.[6/]

Provision 2

> Investigation of the incident for which a disciplinary action may be taken, if at all, will normally be initiated within sixty (60) days after the incident in question, or within sixty (60) days after the Employer becomes aware of the incident.

With regard to Provision 2, the Union explains ". . . the proposal clearly states that if management intends to investigate an incident for

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4/ Union Reply Brief at 3.

5/ Under 5 U.S.C. 2302(b)(6), it is a prohibited personnel practice to:

> grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment . . . for the purpose of improving or injuring the prospects of any particular person for employment[.]

6/ In finding subsection C of Provision 1 within the duty to bargain, the Authority makes no judgment as to its merits.

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which disciplinary action may be taken, such investigation must normally be initiated within sixty (60) days after the alleged incident."[7/] Further, the Union asserts that the Provision "includes the caveat 'normally' to allow management the authority to exceed the sixty (60) days limit in extraordinary cases when it is necessary to do so."[8/] Thus, Provision 2 establishes a contractual "statute of limitations" upon the Agency's ability to investigate incidents which may result in the disciplining of employees, i.e., except in "extraordinary" circumstances, since an investigation, if it is to be undertaken at all, must be initiated within the prescribed period. While there is no legal or regulatory requirement that an investigation be the condition precedent to the imposition of discipline, the standard of proof management must meet, i.e., a "preponderance of the evidence,"[9/] to prevail upon appellate review of an adverse action, makes a thorough investigation the necessary precursor to disciplinary action in most instances. Moreover, FPM chapter 752 subchapter 3-3.1(2) contemplates that documentation upon which an agency bases its decision to impose discipline may include, inter alia, statements of witnesses, affidavits, and investigative reports or extracts from such reports. Thus, it is clear that in many situations investigations are the essential first step to disciplinary action and preventing the initiation of investigations, as would Provision 2 upon expiration of the prescribed period of time, effectively precludes the imposition of discipline.[10/] Consequently, Provision 2 is outside the duty to bargain in that it would, in certain circumstances, prevent the Agency from acting at all with respect to its right to take disciplinary action against employees pursuant to section 7106(a)(2)(A) of the Statute. See National Treasury Employees Union and Internal Revenue Service, 6 FLRA 522 (1981) (Union Proposal I).

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to subsection A of Provision 1 and Provision 2, be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall rescind the

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7/ Union Reply Brief at 4.

8/ Petition for Review at 2.

9/ 5 U.S.C. 7701(c)(1)(B).

10/ It is pertinent to note that under law or regulation there is no time limit imposed on the initiation of investigations leading to the imposition of discipline or upon the initiation of disciplinary action itself.

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disapproval of subsection C of Provision 1 which was bargained on and agreed to by the parties.

Issued, Washington, D.C., March 26, 1985

Henry B. Frazier, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Activity

and

Case No. 0-AR-928

LOCAL 2006, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Gladys Gershenfeld filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)). For the reasons that follow, the Authority is without jurisdiction to review the exceptions and the exceptions therefore must be dismissed.

Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which, in turn, applies to specified adverse actions including removals. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Since the arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority.

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Consequently, the Authority is without jurisdiction to review the exceptions. Rather, the grievant may seek judicial review of the arbitrator's award pursuant to 5 U.S.C. § 7703.

Accordingly, and apart from other considerations, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C. March 26, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 15

Union

and

Case No. 0-NG-1107

U.S. DEPARTMENT OF THE ARMY,
ARMY ARMAMENT MUNITIONS AND
CHEMICAL COMMAND

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition for review of negotiability issues filed by the Union.

The record before the Authority in this case indicates that during the course of negotiations, the Union submitted proposals concerning the time limit for grieving the denial of a within grade increase under the negotiated grievance procedure. By letter dated February 6, 1985, the Activity declared the Union's proposals to be nonnegotiable. The Union then filed the instant petition for review with the Authority pursuant to section 2424.3 of the Authority's Rules and Regulations, as to whether the disputed proposals were within the duty to bargain. Subsequently in a letter to the Authority dated March 7, 1985, the Agency withdrew the Activity's allegation of nonnegotiability.

Since the Agency has withdrawn the allegation of nonnegotiability concerning the Union's proposals, there is no longer an issue as to whether the proposals in this case are within the parties' duty to bargain under the Statute.

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 26, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 32, AFL-CIO

Union

and

Case No. O-NG-675

OFFICE OF PERSONNEL MANAGEMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents an issue relating to the negotiability of the following Union proposal.

Union Proposal

> Since review work will be included as a performance element in the performance standards for Claims Examiner, and since reviewers get an advantage when they screen the work and perform the easy work, which disadvantages all other employees on the team, review duties will be rotated equally to all staff members every 6 months based on an alphabetic listing of examiners by last name unless the performance appraisal and performance standards take into account the failure to rotate. This will also apply to any changes to the assignment of work in ASD at this time.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination. The proposal, in effect, requires that the Agency rotate reviewing assignments equally among employees in the prescribed manner unless it is willing to revise performance standards and appraisals in some manner.

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With regard to the aspect of the proposal requiring six month rotation of the review function, the Agency states, without contravention:1/

> It is essential that the reviewer be able to identify errors quickly and bring them to the attention of the management team and the employee who has erred. A review function performed by those who are not sufficiently experienced or skilled to identify errors would be inimical to the accomplishment of [the Agency's] mission and not in the public interest.2/

In this regard, the instant proposal is to the same effect as Union Proposal 1 in National Treasury Employees Union and Internal Revenue Service, Dallas District, 13 FLRA No. 9 (1983) which required that certain assignments be distributed among employees "on an equitable basis." In that case, the Authority, noting that the proposal would "prevent management from taking into account valid considerations in making work assignments," concluded that such proposal was inconsistent with management's right, pursuant to section 7106(a)(2)(B) of the Statute, "to assign work." Thus, based on Internal Revenue Service, Dallas District, and the reasons and case cited therein, the aspect of the Union Proposal concerning rotation of review work herein is also outside the duty to bargain.

Although the intent of the phrase "take into account the failure to rotate" is unclear in the instant proposal, it is nonetheless apparent that the second part of the proposal concerns the content of performance standards. In this respect, it is similar in effect to Union Proposal 2 in American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Social Security Administration, 12 FLRA No. 6 (1983) which sought to provide trainees with time allowances to learn and implement a specified work procedure. The Authority found that proposal to be outside the duty to bargain, pursuant to section 7106(a)(2)(A) and (B) of the Statute, because it required negotiation of the content of performance standards, specifically the quantity and timeliness of employees' work product. In like manner, the Union Proposal herein, in part, seeks negotiations on performance standards and, based on Social Security Administration and the reasons and cases cited therein, is to that extent also outside the duty to bargain.

1/ The Union filed no reply to the Agency's Statement of Position.

2/ Agency's Statement of Position at 4.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., March 27, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION, REGION II

Respondent

and

Case No. 2-CA-1162

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL NO. 242

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Charging Party and the General Counsel filed exceptions to the Judge's Decision with supporting briefs, and the Respondent filed oppositions to the General Counsel's and the Charging Party's exceptions.1/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

The Authority adopts the Judge's conclusion that the Respondent did not violate section 7116(a)(1) and (5) of the Statute when it refused to bargain over the Charging Party's proposal regarding reduction-in-force competitive areas. Thus, the Authority agrees with the Judge that the proposal would directly determine working conditions of employees outside the Charging Party's exclusively-recognized unit. In this regard, the

1/ Contrary to the Respondent's contention, the Charging Party's exceptions were timely filed. Thus, the Authority's records indicate an extension of time to file exceptions was granted until January 5, 1984, and that the Charging Party's exceptions were filed on that date.

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Authority finds that the proposal on its face would define the competitive area of non-unit employees in the San Juan District Office. American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984).2/

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-1162 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 27, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this disposition, the Authority finds it unnecessary to reach and does not adopt the Judge's finding that the proposal was nonnegotiable because it interfered with management's right to hire and assign employees under section 7106(a)(2)(A) of the Statute.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES, FOOD AND DRUG ADMINISTRATION, REGION II Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL NO. 242 Charging Party	Case No.: 2-CA-1162

Susan Cohen DeStefano, Esq.
For the Respondent

Allan W. Stadtmauer, Esq.
For the General Counsel

Sidney P. Morse
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 17, 1983 by the Regional Director for the Federal Labor Relations Authority, New York, New York Region, a hearing was held before the undersigned on April 11, 1983 at New York, New York.

This is a proceeding arising under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based on a first amended charge filed on December 20, 1982 by American Federation of Government Employees, AFL-CIO, Council No. 242 (herein called the Union or AFGE Council No. 242) against Department of Health and Human Services, Food and Drug Administration, Region II (herein called Respondent).

The Complaint herein alleged, in substance, that since June 10, 1981 Respondent (a) rejected the Union's proposals for bargaining re reduction-in-force competitive areas for unit employees as being nonnegotiable since

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they conflicted with higher-level agency regulations that could not be modified at the lower level; (b) refused to bargain with the Union re competitive areas to be utilized in a reduction-in-force affecting unit employees -- all in violation of Sections 7116(a)(1) and (5) of the Statute.

Respondent filed its Answer dated February 11, 1983 wherein it admitted the foregoing allegations but denied the commission of any unfair labor practice. It averred that the refusal to bargain was based on DHHS Instruction 351-1 defining competitive areas in the Region; that no determination has been made by the Authority that no compelling need exists for this Agency-wide rule, and the Instruction is thus nonnegotiable; that a decision herein should be reserved pending the outcome of two other cases involving the same issue.

At the hearing the parties introduced into evidence a "Stipulation of Facts" which incorporated therein, by reference, 16 exhibits that are annexed to the stipulation. None of the parties desired to introduce testimony through witnesses. Briefs were filed thereafter with the undersigned which have been duly considered.

Upon the entire record herein, including the stipulated facts and exhibits in evidence, I make the following findings and conclusions:

Findings of Fact[1/]

1. At all times material herein the Union has been the collective bargaining representative of all professional and non-professional employees of the New York, New York; Newark, New Jersey; and Buffalo, New York District offices of the Food and Drug Administration (FDA), Region II, excluding all professional and non-professional employees of the office of the Regional Director, Region II, all employees in the San Juan, Puerto Rico, District office, and other employees not relevant to this matter.

2. At all times material herein, the National Treasury Employees Union, Chapter 210 has been the collective bargaining representative of all professional and non-professional employees of the office of the Regional Director, Region II, DHHS, as well as all professional and non-professional employees of the Region II office of the Public Health Service. Five NTEU bargaining unit employees were and are physically located at FDA headquarters in Brooklyn, New York.

1/ Except for a few variations, which result from an attempt by the undersigned to clarify language or include additional evidence, the findings track the Stipulation of Facts entered into by the parties herein.

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3. At all times material herein, no collective bargaining agreement has existed between the Union/AFGE Council No. 242 and Respondent covering all employees in the unit described in paragraph 1 above.

4. Prior to August 22, 1979 employees in Respondent's New York, New York District, Newark, New Jersey District, and its Buffalo, New York District were represented for the purposes of collective bargaining in separate units by AFGE Local 2637, Local 3485 and Local 3174 respectively. On August 22, 1979 said units were consolidated pursuant to a Certification of Consolidation of Units issued by the Regional Director, Region II, and were thereafter represented in the consolidated unit described in paragraph 1 above.

5. Prior to August 22, 1979 collective bargaining agreements were in effect between Respondent's Districts and the Local Unions referred to in paragraph 4 above. There has been no express agreement between the Respondent and the Union herein to continue the predecessor agreement as being in full force and effect following the consolidation of units. Said agreements have, however, been generally viewed by the parties as guides for continuing regular working conditions. Where necessary, the parties have expressly discussed and mutually agreed to the continuation or application of given provisions of the predecessor agreements to specific work situations which have arisen, but no such agreements are relevant to this proceeding.

6. In mid-May, 1981 Respondent notified the Union of a proposed reduction-in-force (RIF) affecting employees in Public Health Service (PHS) Region II, and therefore potentially affecting employees in FDA, Region II, affording the Union the opportunity to bargain concerning the impact and implementation of the said RIF.

7. By memorandum dated May 18, 1981 Respondent's Regional Food and Drug Director, Caesar Roy, forwarded to Sidney Morse, President of the Union herein, a memo from William F. Confalone, Respondent's Labor Relations Officer re "Negotiability of RIF Procedures." This memo stated, inter alia, that Department Instruction 351-1 serves as authority for those areas on which the Department has discretion concerning bargaining; also that matters already determined at the Department level, as well as those within its discretion, would be decisions made above the level for which the Council has recognition and, thus, outside the bargaining obligation. Listed were various subjects deemed not negotiable, including one designated as:

Establishing Competitive Areas

8. By memorandum dated May 28, 1981 addressed to Respondent's Regional Food and Drug Director, Union President Morse demanded negotiations of the procedures that would be followed to effect any RIF, and the arrangements for unit employees who might be adversely affected. In the

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memo Morse listed 10 subjects to be negotiated, including "Establishment of competitive areas."

9. Representatives of the Union and Respondent met on or about June 8, 1981 to discuss the request to negotiate made by AFGE Council No. 242. Respondent's Regional Director requested that the Union present specific proposals on the 10 enumerated areas in its May 28, 1981 memorandum, so that Respondent could analyze the proposals, develop counter proposals, and enter into negotiations.

10. By memorandum dated June 8, 1981, and entitled "COMPETITIVE AREAS," Morse proposed to Respondent's Regional Food and Drug Director that competitive areas be set up solely within the FDA, Region II, within each District office, and be applicable to all employees of the District Office. He stated that no one from another primary operating component of the Department of Health and Human Services would be a part of an FDA reduction-in-force, nor would anyone from another primary operating component displace an employee of FDA Region II unless such displacement was dictated by law. The competitive area in FDA Region II would be the District including its Resident posts.

11. By memorandum dated June 10, 1981, and entitled "Negotiations on Competitive Areas," Respondent's Regional Food and Drug Director, Caesar Roy, advised Morse that the Union's June 8 proposal re competitive areas was inconsistent with Department of Health and Human Services policy as described in Departmental Instruction 351-1-40. Thus, the proposals on competitive areas were rejected on the basis that they were nonnegotiable.

12. In a letter dated June 12, 1981 Morse wrote John Mulholland, Director, Labor-Management Services Department, AFGE and requested that he institute a negotiability appeal on behalf of the Union. Morse attached copies of the memos of May 28, June 8, and June 10 (set forth respectively in paragraphs 8, 10, and 11 above).

13. In a letter dated June 25, 1981 Mulholland requested that Caesar Roy furnish the Union the employer's written allegations concerning the nonnegotiability of the Union's proposals on competitive areas.

14. In a letter dated July 9, 1981 Caesar Roy informed Mulholland that the subject of competitive areas was not within his discretion to negotiate, but was imposed upon FDA, Region II by the Department of Health and Human Services, Region II, under law, regulation and Departmental Instruction 351-1-40.

15. By memorandum dated August 5, 1981 Union President Morse formally demanded of the Regional Food and Drug Director that Respondent return to the bargaining table with an individual who had the authority to negotiate competitive areas in any RIF that could impact on the members of the Union; that the person should be capable of negotiating any areas of a RIF called for in the Union's earlier memo on the subject.

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16. By memorandum dated August 5, 1981 Caesar Roy responded to Morse's August 5 memo re the proposals to negotiate the subject of competitive areas in a reduction-in-force. Roy referred Morse to the earlier correspondence, as set forth herein in paragraph 11 and 14 above, stating that such documents expressed his position re the issue of negotiation on competitive areas.

17. The referenced Departmental Instruction 351-1, was originally established in 1973 as HEW Instruction 351-1, with minor modifications in 1980 and 1982. Neither of these modifications has changed the language of the pertinent portion of the Instruction at 351-1-40A.(5)(d) on COMPETITIVE AREAS. The competitive area established in the Departmental Instruction would "include non-members of the Union's bargaining unit, including employees represented by NTEU under the certification referenced in paragraph 2 above, as well as supervisory and managerial employees.

18. Department of Health and Human Services Instruction 351-1-40, effective during the period in questions, provided inter alia:

> 351-1-40 COMPETITIVE AREAS
>
> A. The normal subdivisions of the Department for reduction in force are outlined below:
>
> . . .
>
> 5. Positions under a regional office's appointing authority form competitive areas as follows:
>
> . . .
>
> d. For positions other than those covered by 5.a., b., or c. above,[2/] separate competitive areas are established region-wide within each of the following components: Office of the Secretary, Public Health Service, Health Care Financing Administration, Office of Child Support Enforcement, Office of Human Development Services, and Social Security Administration. (Underscoring supplied)

19. No negotiability appeal was instituted on the Union's proposals on competitive areas.

20. From June 10, 1981 and at all times thereafter the Union (AFGE Council No. 242) has made no other proposals pertaining to any other aspect of the reduction-in-force which is the subject of this complaint,

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2/ 5.(a)(b) and (c) refer respectively to separate competitive areas for a) PHS Hospital, SSA Program Service Center, SSA Data Operations Center; b) Indian Health Service positions; c) All other clerical, secretarial and wage rate positions in a commuting area.

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and Respondent has refused and continues to refuse to negotiate over the proposal which was made by the Union referred to in paragraph 10 above, for the reasons specified in paragraphs 11, 14, and 16 above.

21. No reduction-in-force which has taken place since June 10, 1981, has affected bargaining unit employees in FDA Region II.

22. Since the date of the filing of the instant charge, the Authority has determined that there is no compelling need for HHS Instruction 351-1-40. Respondent does not assert a compelling need defense in this case.

23. The issue presented herein is whether the Respondent failed or refused to consult or negotiate in good faith in violation of Sections 7116(a)(1) and (5) of the Statute by rejecting the Union's proposals for bargaining regarding reduction-in-force competitive areas for unit employees as being nonnegotiable because they conflicted with higher level agency regulations which could not be modified at the local level.[3/]

Conclusions

In support of an alleged violation of Sections 7116(a)(1) and (5) of the Statute it is contended that no justification existed for Respondent's refusal to negotiate as to the Union's proposals re reduction-in-force competitive areas. It is argued that the Authority has deemed competitive areas to be negotiable as to substance. Further, that no merit may be found in Respondent's insistence that the said proposals conflict with higher level agency regulations since the Authority has concluded no compelling need exists for such regulation, or in this instance, Instruction 351-1-40. Finally, General Counsel avers the bargaining proposals would not determine conditions of non-unit employees so as to render them nonnegotiable.

Respondent, contrariwise, asserts that its higher level Instruction 351-1-40 warrants a refusal to bargain on the Union's proposals. It maintains that these proposals would determine conditions of employment of employees outside the Union's bargaining unit; that its assertion of nonnegotiability, due to a conflicting agency-wide regulation, was made in good faith. Accordingly, it maintains that the rejection of the proposals for bargaining on competitive areas as nonnegotiable did not constitute a violation of the Statute.

3/ Although the parties have so framed the issue, the undersigned is constrained to broaden it to consider whether the proposal by the Union is negotiable and require Respondent to bargain thereon.

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The Union insists it was merely attempting to establish a competitive area within FDA in Region II. It contends that while the June 8, 1981 proposals might impact upon employees outside the bargaining unit, the effect was of a 'spillover' nature. Further, the Union argues that the limitation of a competitive area, as proposed, would not result in determining conditions of employment concerning non-unit employees. Whatever incidental effect it might have upon those outside the bargaining unit, it is urged, would not cause the proposal to become a non-bargainable matter.

A competitive area is defined in 5 CFR 351.402. The term refers to the part of an agency within which an employee, who occupied an abolished position, may compete with other employees to determine which one shall be retained in the agency. The area may be described in organizational and geographic terms. Typically, the competitive area includes a part of an agency wherein employees are assigned under a single administrative authority. Under 351.402(c) and (d) smaller and larger areas than the standard may be established.

The Authority has made several recent determinations regarding competitive areas and the negotiability of proposals involving the use thereof in the event of a reduction-in-force. Thus, in National Treasury Employees Union and Department of Health and Human Services, Region IV, 11 FLRA No. 53 (1983), it held that agencies may establish competitive areas through negotiation provided that such areas are in conformance with standards promulgated by OPM, and not otherwise inconsistent with law, rule, or regulations - all pursuant to 5 U.S.C. 3502.

Where a particular proposal by a union does not require an agency to act beyond its discretion under applicable OPM regulations, or to agree to a competitive area inconsistent with applicable law or regulation, the proposal re competitive area is negotiable. See American Federation of Government Employees and General Services Administration, 11 FLRA No. 54 (1983).

In addition to the foregoing determinations by the Authority, the latter also had occasion to consider the same HHS Personnel Manual Instruction 351-1-40 as is involved in the case at bar. Thus, in National Treasury Employees Union and Department of Health and Human Services, Region IV, supra, the agency contended a union proposal re establishing a competitive area was nonnegotiable. It claimed that negotiations were barred by the agency-wide regulation - Instruction 351-1-40 - since a compelling need existed for the regulation under the criteria presented by Section 2424.11 of the Authority's Rules and Regulations. Concluding that no compelling need existed for the said regulation, the Authority held that the union proposal for establishing a competitive area was negotiable and within the agency's duty to bargain.

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The Authority has had occasion to consider the negotiability of proposals concerning competitive areas involving a reduction-in-force. In Service Employees' International Union, AFL-CIO, Local 556 and Department of the Army, Office of the Adjutant General, Hale Koa Hotel, Honolulu, Hawaii, 9 FLRA No. 81 (1982) the union proposed the establishment of a competitive area for RIF purposes which included bargaining unit employees and employees in another unit of exclusive representation. It was held that the agency had no obligation to bargain on said proposal. As proposed, unit employees would be given rights to non-unit positions, and thus non-unit employees could be displaced from their employment. Accordingly, the Authority concluded the proposal determined the condition of employment of non-unit employees. It reasoned that such a proposal reached beyond the representation rights of the exclusive representative.

In a similar view, the Authority found a union proposal nonnegotiable which declared that in a RIF the bargaining unit members could bump employees in other competitive levels.[4]/ See International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 8 FLRA No. 46 (1982). The duty to bargain, declared the Authority, does not extend to matters concerning positions and employees outside the bargaining unit. Under the proposal by the union in the cited case the rights of employees outside the bargaining unit could be prescribed thereby. Since, therefore, the proposal would result in its being applied uniformly to non-unit as well as unit employees, it was held that the agency could not be required to negotiate thereon.

No case has been cited, nor uncovered, which involved the precise situation as involved herein. The General Counsel takes the position that the Service Employees' International Union et. al., supra, is distinguishable from the one at bar. After due and careful consideration, however, I have concluded that the rationale and holding in said case has applicability to the instant matter. It is true that the proposal by the Union herein re the establishment of a competitive area within FDA in Region II is sanctioned by the federal regulations (5 CFR 351.402). Moreover, the area as proposed does not encompass a non-bargaining unit as was true in the cited case, supra. However, the proposed language herein

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[4]/ A competitive level includes positions in a competitive area in the same grade or occupational level. These positions are sufficiently alike in various respects so that an incumbent therein may be assigned to any of the other positions. In such an instance, it would not change terms of his appointment or unduly interrupt the work program. (5 CFR 351.403).

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also states "nor will anyone from another POC[5]/displace an employee of FDA Region II unless such displacement is dictated by law". (Underscoring supplied). Apart from a RIF at FDA, Region II, this clause precludes an employee at another division of the Department from ever displacing or bumping an employee in this FDA region. As such, the proposal is concerned with more than the retention rights of the bargaining unit employees in the event of a reduction-in-force. It extends to the right of reassignment or transfer of employees outside the bargaining unit. Thus the proposal is not limited to a reduction-in-force at FDA, Region II, but deals with employment conditions and rights of non-unit employees. An employee from outside FDA, Region II may not, under this proposal, be hired to work in this competitive area and displace someone in the bargaining unit whose displacement occurs under any circumstances. A limitation or restriction in regard to such action, be it transfer, hire or reassignment, would necessarily determine the conditions of employment of such individual who has been employed in the Department as a non-unit employee.

In its brief General Counsel insists that a bargaining proposal is within the duty to bargain even though it affects conditions of employment of non-unit employees. The case of National Treasury Employees Union and Internal Revenue Service, 7 FLRA No. 42 (1981) is cited in support thereof. Said case, however, involved proposals by the union to management which would establish procedures for filling vacancies within the bargaining unit to be followed before such vacancies could be filled for non-bargaining unit employees. It was expressly provided that the employer could consider applicants from other sources.[6]/ Accordingly, the Authority declared such a proposal to be negotiable since the agency would not have been prevented from excusing its statutory authority. Moreover, the procedure was well within the duty to bargain under Section 7106(b)(2) of the Statute. The case at bar presents a situation far different, for we are not concerned herein with a proposal regarding procedures to be followed in filling vacancies. The Union herein would prevent anyone outside the bargaining unit from being selected to displace any unit employee. Under Section 7106(a)(2)(A) management's right to hire and assign employees are preserved. Restricting the transfer of an employee to the competition area interferes with that right. Moreover, it extends beyond the conditions of employment of bargaining unit employees, which is a predicate for imposing upon an employer an obligation to bargain under Sections 7103(a)(12) and (14) of the Statute.

5/ This refers to an operating component or, as later described, an operating division.

6/ The union in the cited case asserted that the proposal was not intended to prevent the agency from making selections from any appropriate source.

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In sum, I am constrained to conclude that the bargaining proposal made by the Union would, in fact, bear on and prescribe working conditions of employees outside the FDA, Region II unit. In this posture, the Union's submission would determine rights of employees in non-bargaining units. Hence, the proposal is nonnegotiable and, as such, does not impose a bargaining obligation upon the Respondent. Accordingly, I conclude the latter has not refused to bargain as alleged in the complaint in violation of Sections 7116(a)(1) and (5) of the Statute; and, further, it is recommended that the Complaint herein be dismissed. 7/

Having concluded that Respondent did not violate Sections 7116(a)(1) and (5) of the Statute, it is recommended the Authority adopt the following order:

ORDER

It is ordered that the Complaint herein be, and the same hereby is, dismissed.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: November 3, 1983
Washington, DC

7/ The Union maintains that Respondent's refusal to bargain in good faith is evidenced by its raising a defense of nonnegotiability two years after it declined to negotiate based on its regulation and a compelling need therefor. However, at the time the Respondent claimed a compelling need existed no determination in this regard had been made by the Authority. It was later declared that there was no compelling need for regulation 351-1-40. Thus, I reject the contention that the Respondent could not have raised a good faith doubt of its obligation to bargain in 1981. Further, I cannot conclude that the agency was barred from raising the issue of non-negotiability herein. See Delaware National Guard and Association of Civilian Technicians, Delaware Chapter, 10 FLRA No. 28 (1982).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
CENTRAL OFFICE, REGION IV
INTERAGENCY MOTOR POOL
KENNEDY SPACE CENTER

Respondent

and

Case No. 4-CA-1058

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Respondent and the General Counsel filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the General Counsel's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire stipulated record, the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

The Judge found, based upon a stipulated record without a hearing, that the Respondent interfered with employees' protected rights under section 7102 of the Statute, in violation of section 7116(a)(1) of the Statute, by discontinuing its original termination plan and discharging five rather than two temporary drivers because of the Union's "second guessing." The Authority disagrees.

Thus, the Authority concludes that the evidence contained in the stipulated record fails to support the Judge's finding that the Respondent's actions interfered with, restrained or coerced employees in the exercise of rights protected by the Statute. In this regard, as noted by the Judge, the Union president was not acting as the exclusive representative of the temporary drivers at the meeting of June 19 inasmuch as they were not members of the bargaining unit, and, as further noted by the Judge, the record also does not indicate in what capacity he was attending that meeting along with the Respondent's Equal Employment

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Counselor. Indeed, there is no record evidence that the temporary drivers either requested his assistance or even knew that he would seek to act on their behalf, or were otherwise engaging in protected activity under section 7102 of the Statute. Moreover, there is no record evidence that the supervisor's statement at the June 19 meeting that he was tired of being second guessed concerning his decision was directed toward the Union. Accordingly, the Authority concludes that the General Counsel has failed to sustain the burden of proving the allegations of the complaint that the Respondent violated section 7116(a)(1) of the Statute by terminating several non-unit temporary employees because the Union intervened on their behalf and attempted to discuss their terms and conditions of employment. Cf. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 16 FLRA No. 21 (1984) (no evidence was presented that discipline of a supervisor had a chilling effect on the exercise of protected employee rights).

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-1058 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 27, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr. Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

GENERAL SERVICES ADMINISTRATION CENTRAL OFFICE, REGION IV INTERAGENCY MOTORPOOL KENNEDY SPACE CENTER Respondent	
and	Case No. 4-CA-1058
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

George U. Lane, Esquire
For the Respondent

Barbara S. Liggett, Esquire
For the General Counsel

Mr. Homer Mays
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder, Fed. Reg., Vol. 45, No. 12, January 17, 1980, and Vol. No. 46, No. 154, August 11, 1981, 5 CFR Chapter XIV, Part 2411, et seq.

Pursuant to an amended charged first filed on July 10, 1981, by the American Federation of Government Employees, AFL-CIO (hereinafter called

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the AFGE or Union), a Complaint[1/] and Notice of Hearing was issued on September 29, 1981, by the Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleges that the General Services Administration Central Office, Region IV, Interagency Motorpool Kennedy Space Center (hereinafter called the GSA or Respondent), violated Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute or Act), by virtue of its actions in terminating temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell, and Shirley Shafer because Mr. Homer Mays, President of Local 2498, intervened on their behalf and attempted to discuss their terms and conditions of employment.

Following the issuance of the Complaint and Notice of Hearing, all parties entered into a stipulation of facts and exhibits and jointly filed a motion with the Office of Administrative Law Judges wherein they waived oral hearing and requested that the record be opened for the sole purpose of receiving the stipulation and exhibits and that a decision be rendered solely on the basis of such stipulation of facts and exhibits, and the parties post-hearing briefs. The motion was granted on March 16, 1982, and the parties were given until April 16, 1982, to file post-hearing briefs. The General Counsel and the Respondent submitted post-hearing briefs which have been duly considered.

Upon the basis of the entire record, which of course, consists of the stipulation of facts, stipulation of exhibits, and the parties post-hearing briefs, I make the following findings of fact,[2/] conclusions, and recommendation.

Findings of Fact

The Union Local 2498 was granted exclusive recognition for an appropriate unit, as set forth below, on February 4, 1966. On September 10, 1980, the Federal Labor Relations Authority certified a unit consolidating all AFGE represented bargaining units with GSA in Case No. 3-UC-1. Since that date, the American Federation of Government Employees (the national Union) has been the exclusive representative. On November 21, 1974, an agreement between GSA Region 4 and Union Local 2498 was put into effect. Upon consolidation of the AFGE units, a written agreement

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1/ In the absence of any opposition, the General Counsel's motion to amend the Complaint and substitute the name "Vivian Daniel Smith" for the name "Daniel Smith" is hereby granted.

2/ Since the record consists solely of facts and exhibits stipulated by all parties, there is no dispute as to the facts. The factual summary set forth infra, is for the most part a verbatim recitation of the stipulation of facts.

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between GSA and AFGE outlined interim measures for the relationship. On February 24, 1981, AFGE cancelled the interim agreement, notified GSA that it would assume a national relationship. On February 24, 1981, AFGE cancelled all collective bargaining agreements. The parties hereto agree that as relates to all matters and proceedings herein, the Union has been and remains the exclusive representative of the employees of Respondent in an appropriate unit as set forth and described in a collective bargaining agreement, which has been in effect since on or about November 21, 1974.

The appropriate unit set forth in the agreement includes all civil service employees of the Kennedy Space Center with Florida duty stations including those in a TAPER status, who are classified as both non-supervisory and non-professional, excluding professional, supervisory, managerial, temporary and confidential employees.

In a letter dated June 17, 1981, the National Aeronautics and Space Administration herein NASA, notified Respondent that due to NASA budget limitation, the funding for five of the seven temporary drivers employed by Respondent and utilized by NASA would terminate effective June 26, 1981. Respondent had, at NASA's request, previously hired seven drivers on a temporary appointment not to excess one (1) year. Since these seven drivers were being funded by NASA on a reimbursable basis to Respondent, the termination of that funding required the immediate termination of those five employees unless Respondent was able to continue funding.

On or about June 18, 1981, a meeting was arranged by Roger Willadsen, Fleet Manager for Respondent's interagency motor pool at the Kennedy Space Center. In attendance at that meeting was Mr. Willadsen and Mr. Homer Mays, President of Union Local 2498.[3/] Mr. Mays and Mr. Willadsen discussed NASA's request for the termination of five temporary drivers and the plan Mr. Willadsen had developed for the absorption of three of those five employees through detail of permanent employees. Since the action would impact on permanent employees within the collective bargaining unit, Mr. Willadsen arranged the discussion meeting. Mr. Willadsen projected this absorption plan to be six weeks in duration.

The plan as outlined at this meeting did not identify the three employees to be absorbed, nor did it identify the two remaining employees to be terminated. Mr. Mays made no specific objections to the plan, though he did make the recommendation that terminations be made in accordance with the collective bargaining agreement. Mr. Willadsen indicated that performance would be a significant criteria in his determination.

3/ The record does not indicate whether Mr. Mays was an employee of Respondent.

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After discussions and after receiving recommendations from his line supervisors, and after determining that the affected permanent employees had voluntarily agreed to the temporary details, Mr. Willadsen informed the temporary drivers of the planned disposition of all seven temporary drivers. The original planned disposition was as follows:

(a) Employees Eldridge and Parker (males) would continue to be funded by NASA.

(b) Employees Mitchell (male), Golden and Shafer (females) were to be absorbed by Respondent.

(c) Employees Fisher and Ehrke (females) were to be terminated.

On or about June 19, 1981, after announcement of the employee disposition, Mr. Mays requested a second meeting with Mr. Willadsen. In attendance at that meeting were Mr. Mays, accompanied by Verdell Fayson, the Equal Employment Counselor.4/ At this meeting, Mr. Mays sought to discuss the criteria being used to determine which employees should be terminated and which employees should be retained. Mr. Mays challenged the determination on the basis that: (a) seniority was not used as a criteria, and (b) no equal employment counseling was sought before making the determination to terminate only females. Mr. Willadsen maintained that the plan and the method of implementation was a management decision. As the discussion progressed, Mr. Willadsen advised Mr. Mays and Fayson that he was tired of being "second guessed" concerning this decision and, accordingly, he would rescind his original planned disposition for the temporary drivers and would terminate five drivers rather than two. Mr. Willadsen then contacted Respondent's Region IV, Atlanta office of personnel by telephone to confirm his decision to terminate all five of the temporary drivers. At the conclusion of the telephonic conference, Mr. Willadsen again announced that Respondent had decided to abandon the plan to absorb three temporary employees and was reverting to the original mandate from NASA to terminate five temporary employees.

On or about June 26, 1981, temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell, Shirley Shafer, and Dorothy Ehrke were terminated.

Temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell, and Shirley Shafer would not have been terminated at that time but for the intervention of Mr. Mays.

4/ The record does not indicate in what capacity Mr. Mays was appearing at the meeting or whether Verdell Fayson was a part of management or just a rank and file employee.

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Discussion and Conclusions

The General Counsel takes the position that the Respondent violated Section 7116(a)(1) when it announced on May 19, 1981, that it was rescinding the original planned disposition for the temporary drivers and would terminate five surplus temporary drivers rather than just two surplus temporary drivers. Since the Respondent's action was admittedly caused by Union President Mays' criticism of the original termination plan, the General Counsel contends that Respondent's action made it clear to all of Respondent's employees that the utilization of the Union's assistance in future disputes would bring dire consequences. According to the General Counsel, Respondent's action in creating such an impression upon Respondent's employees was violative of Section 7116(a)(1) of the Statute in that it coerced and restrained the employees in the exercise of their Section 7102 rights to form, join, and assist a labor organization, freely and without fear of penalty.

The General Counsel does not contend that Respondent's action was violative of Sections 7116(a)(2) and (5) of the Statute. Thus, the General Counsel acknowledges that the Respondent was under no obligation to bargain with Union concerning the temporary employees since they were not members of the recognized unit and that the temporary employees were not laid off or terminated because of any protected union activity.

The Respondent on the other hand takes that position that its action did not violate Section 7116(a)(1) of the Statute. In support of its position Respondent contends that inasmuch as the temporary employees were not in the recognized unit it was under no obligation to bargain with the Union over their conditions of employment. Further, according to Respondent, the fact that the Union might have been appearing as the personal representative of the temporary drivers does not alter this conclusion, since concerted activity is not protected by the Statute. Finally, according to Respondent, inasmuch as the stipulation "provides inadequate evidence to support a finding of anti-union animus", Respondent's actions could not be said to have created a "chilling" effect on the bargaining unit employees.

It is well established that employees have a right to form, join or assist a labor organization without fear of penalty or reprisal and that interference with such right is violative of Section 7116(a)(1) of the Statute.

In the instant case Respondent, admittedly, terminated five rather than two temporary employees because it resented the Union President's attempted intrusion on its decision to select two temporary employees for termination without reference to either seniority or EEO considerations.

Had the Union been acting in its capacity as exclusive representative of unit employees, the law is clear, that Respondent's action in

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rescinding the proposed plan would be violative of Section 7116(a)(1) of the Statute since such retaliatory action clearly conveyed to the employees, unit and non-unit alike, the impression and/or message that utilization of union representation or assistance could, and indeed did, result in dire economic consequences. Pennsylvania Army and Air National Guard, A/SLMR No. 1085; Department of Transportation, FAA, Airway Facilities Sector, Tampa, Florida, A/SLMR No. 725; Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 6 FLRA No. 108.

However, such is not the case. Mr. Mays was appearing not as the exclusive representative of the unit employees but rather apparently as the personnel representative of some of the temporary non-unit employees who were scheduled for termination. In such circumstances, Respondent, as pointed out supra, would distinguish the rights accorded its employees and find no violation of the Statute. I cannot agree.

Employees, be they unit or non-unit employees,[5/] are accorded the right to form, join, and assist a labor organization freely and without fear of reprisal. To the extent that such right is interfered with, a violation of Section 7116(a)(1) is established. Neither a literal reading of the Statute, the legislative history, nor the case decisions under the Executive Order and the Statute, indicate that a distinction should be made when the union from which assistance is sought by an employee is not the exclusive representative of the employee in a recognized unit. In fact the only distinction in this respect concerns the agency or activity's bargaining obligations, i.e. an agency is only obligated to bargain with a union when it is the exclusive representative in an appropriate unit.

While an agency is under no obligation to bargain and in fact meet with a non-recognized or non-certified union except possibly as an employee's personal representative, it is not free to penalize employees because they have sought or accepted assistance from such union. It is not the forum where remarks are made or actions taken which governs the illegality of such acts or remarks but rather the nature of such acts and remarks. If the acts or remarks interfere with the rights accorded employees under the Statute then they are violative of Section 7116(a)(1) irrespective of the forum or circumstances where uttered or taken.[6/] To hold otherwise would result in sanctioning coercive or restraining

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5/ In reaching this conclusion it is noted that the Statute defines an employee as "an individual employed in an agency". Inasmuch as the temporary drivers involved herein are individuals employed by an agency, they are therefore entitled to all the rights accorded "employees" under the Statute.

6/ See Department of Transportation, FAA, supra.

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statements or actions made by agencies during organizing campaigns, because, similar to the circumstances herein, the union would not have at such time achieved the status of exclusive representative.

Accordingly, to the extent that Respondent contends that the June 19, 1981, meeting, was, at best, "concerted activity" and hence unprotected by the Statute, I find, in accordance with the above analysis, that irrespective of the nature of the meeting, Respondent is not relieved of liability for any statements or actions emanating therefrom which have the effect of interfering with its employees' statutory right.7/

Further, again contrary to the contention of the Respondent, I find that when a statement and/or an action is by its very nature coercive and restraining, no independent evidence of union animus is necessary to sustain a violation of the Statute. Here the very act, i.e. discontinuing the original termination plan and discharging five rather than two temporary drivers because of the Union's second guessing, is by its very nature coercive.

Had Respondent discontinued or abandoned its plan because the Union had demonstrated possible deficiencies in such plan or for that matter any other legitimate reason, a different conclusion might well be in order. However, such was not the case. The stipulation clearly indicates that it was not the merits of the Union's objections to the plan which motivated Respondent's action but rather the Union's "second guessing". In such circumstances Respondent not only interfered with the rights of Respondent's remaining employees to freely accept future representation by the Union but also penalized the four discharged temporary employees because of the Union's intervention on their behalf and deprived them of any future opportunity they may have had to seek union representation in connection with their respective working conditions with the Respondent.

Having found and concluded that Respondent has violated Section 7116(a)(1) of the Statute, I recommend that the Authority issue the following order designed to effectuate the purposes and policies of the Statute.8/

7/ Respondent's reliance on VA Medical Center, Bath, New York, 4 FLRA No. 76 is misplaced. In such case the Authority merely concluded that concerted activity was not protected by the Statute and was not, as here, faced with any threats or other coercive actions emanating therefrom.

8/ Inasmuch as the record indicates that the temporary employees would have only worked for six additional weeks at most, I shall only order Respondent to make them whole.

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ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the General Services Administration Central Office, Region IV, Interagency Motorpool Kennedy Space Center shall:

1. Cease and desist from:

(a) Terminating the employment of temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell and Shirley Shafer because Local Union 2498, American Federation of Government Employees, AFL-CIO intervened on their behalf and challenged a management decision.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Make temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell, and Shirley Shafer whole for any monies lost due to their terminations in retaliation for the intervention of Local Union 2498, American Federation of Government Employees, AFL-CIO, on their behalf.

(b) Post at the General Service Administration Central Office, Region IV, Interagency Motorpool, Kennedy Space Center, Florida, copies of the attached notice maked "Appendix", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a responsible official of Region IV, General Services Administration and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: May 11, 1982
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere, restrain or coerce our employees in the exercise of their rights assured in the Federal Service Labor-Management Relations Statute by terminating the employment of temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell, and Shirley Shafer because Local Union 2498, American Federation of Government Employees, AFL-CIO, intervened on their behalf and challenged a management decision.

WE WILL NOT in any like or related manner, interfere, restrain or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL make temporary employees Charles Parker, Walter Eldridge, Joseph Mitchell, and Shirley Shafer whole for any monies lost due to their terminations in retaliation for the intervention of Local Union 2498, American Federation of Government Employees, AFL-CIO, on their behalf.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is: Suite 501-North Wing, 1776 Peachtree Street, N.W., Atlanta, Georgia 30309, and whose telephone number (404) 881-2324.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1617
SAN ANTONIO, TEXAS

Union

and

Case No. 0-AR-910

SAN ANTONIO AIR LOGISTICS CENTER
KELLY AIR FORCE BASE, TEXAS

Activity

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Harold R. Ainsworth by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, the Authority is without jurisdiction to review the Union's exceptions and they must be dismissed on that basis.

Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

The matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which, in turn, applies to specified adverse actions including removals. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Since the arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions. Rather, the grievant may seek judicial review of the arbitrator's award pursuant to 5 U.S.C. § 7703.

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Accordingly, and apart from other considerations, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 27, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AIR FORCE LOGISTICS COMMAND,
KELLY AIR FORCE BASE
SAN ANTONIO, TEXAS

Activity

and

Case No. 0-AR-925

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL NO. 214,
LOCAL UNION NO. 1617
SAN ANTONIO, TEXAS

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator F. Jay Taylor filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, the Authority is without jurisdiction to review the Union's exceptions and they must be dismissed on that basis.

Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

The matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which, in turn, applies to specified adverse actions including removals. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Since the arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions. Rather, the grievant may seek judicial review of the arbitrator's award pursuant to 5 U.S.C. § 7703.

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Accordingly, and apart from other considerations, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 27, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 12

Union

and

Case No. 0-AR-909

INTERNAL REVENUE SERVICE,
BIRMINGHAM DISTRICT

Activity

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Roger C. Williams filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, the Authority is without jurisdiction to review the Union's exceptions and they must be dismissed on that basis.

Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

The matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which, in turn, applies to specified adverse actions including removals. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Since the arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions. Rather, the grievant may seek judicial review of the arbitrator's award pursuant to 5 U.S.C. § 7703.

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Accordingly, and apart from other considerations, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 27, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE ADJUTANT GENERAL,
STATE OF OHIO

Agency

and

Case No. O-AR-645

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, OHIO COUNCIL OF AIR
NATIONAL GUARD LOCALS NO. 127, LOCAL 3041

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Alan M. Ruben filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter arose when the Agency informed the Union that after the expiration of the parties' collective bargaining agreement, all civilian technicians of the Ohio Air National Guard would have to wear the military uniform while on duty as required by National Guard regulations. The parties' agreement provided that the technicians could annually elect to wear standardized civilian attire rather than the military uniform while on duty. A grievance was filed by a technician who, prior to the expiration of the agreement, had elected to wear the civilian attire.

The Arbitrator interpreted the pertinent provision in the parties' agreement as constituting a limitation on employees, finding that the provision was intended to prevent employees from frequently changing their minds and switching from one type of dress to another. The Arbitrator therefore rejected the Union's argument that since the grievant had submitted his request prior to the expiration of the agreement, he had a right to wear civilian attire for the next year. The Arbitrator also found that the uniform-wearing requirement was a mandatory subject of bargaining, but concluded that since an impasse had developed in negotiations and the Union had failed to initiate impasse procedures, the Agency had a right to implement its uniform policy upon the expiration of the parties' agreement. Accordingly, the Arbitrator denied the grievance.

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In its exception, the Union contends that the award is contrary to law. More specifically, the Union essentially argues that having found that the uniform-wearing requirement was a mandatory subject of bargaining, the Arbitrator erred as a matter of law in concluding that in the circumstances involved the Agency could unilaterally implement the requirement upon expiration of the parties' agreement.

The Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient as alleged. It is well-established that following the expiration of a collective bargaining agreement, either party to that agreement may elect not to be bound by a practice embodied in any contract provision which relates to a matter that is outside the required scope of bargaining under the Statute, i.e., a permissive subject of bargaining. E.g., Headquarters, Fort Sam Houston, Department of the Army and Local 2154, American Federation of Government Employees, AFL-CIO, 15 FLRA No. 181 (1984). In this regard, the Authority has held that the requirement that civilian technicians wear military uniforms is a permissive rather than a mandatory subject of bargaining. Division of Military and Naval Affairs, State of New York, Albany, New York and New York Council, Association of Civilian Technicians, 15 FLRA No. 65 (1984), petition for review denied sub nom., New York Council, Association of Civilian Technicians v. FLRA, No. 84-4128 (2d Cir., March 14, 1985). Thus, in terms of this case, while the Arbitrator erroneously found that the uniform-wearing requirement was a mandatory subject of bargaining, he correctly concluded that after the expiration of the parties' agreement the Agency was entitled to elect not to be bound by the related provision in the agreement and to implement the uniform requirement. Therefore, contrary to the Union's assertion, the Arbitrator's award denying the grievance based on that conclusion is in accordance with law.

Accordingly, the Union's exception is denied.

Issued, Washington, D.C., March 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3424

Union

and

Case No. O-NG-769

FEDERAL HOME LOAN BANK BOARD,
WASHINGTON, D.C.

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises an issue relating to the negotiability of the following Union proposal:

> Examiners who travel 150 miles or more on official business will be permitted three hours overhead travel (OHT).
>
> The above proposal is meant to apply to employees of the Federal Home Loan Bank Board for voluntary travel to return home for week-ends.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

According to the Union's stated intent, the proposal would require the Agency to grant employees a maximum of 3 hours of duty time during workdays for the purpose of traveling to and returning from their places of residence on week-ends. Thus the express language of the proposal would preclude management from exercising its right to assign work to employees during that portion of the workday which is required for travel.

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In this regard, the Union Proposal herein has the same effect as Proposal 1 in American Federation of Government Employees, AFL-CIO, Local 3424 and Federal Home Loan Bank Board, San Francisco, California, 14 FLRA No. 18 (1984). In that case, the proposal at issue required the Agency to grant a maximum of three hours of duty time for traveling, each way, when employees on temporary duty assignments returned to their residences on the weekends. The Authority held, based on its decisions in American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA No. 80 (1983), and National Treasury Employees Union and NTEU, Chapter 80 and Department of the Treasury, Internal Revenue Service, Central Region, 8 FLRA 197 (1982), that because the proposal in Federal Home Loan Bank Board, San Francisco would have precluded the assignment of work to employees during the duty time on which they were traveling to their residences, or returning to their temporary duty assignments, it directly interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute.1/ Thus, as the Union Proposal at issue herein similarly would preclude the Agency from assigning work to employees during that portion of the workday which they would use for travel to and from their residences, for the reasons set forth in the FHLBB, San Francisco; FHLBB, New York District and IRS, Central Region decisions, it directly interferes with management's right to assign work under section 7106(a)(2)(B) and is outside the Agency's duty to bargain.2/

1/ Section 7106(a)(2)(B) provides, in relevant part:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(B) to assign work[.]

2/ Of course, management must exercise its rights under section 7106(a)(2) in accordance with applicable laws. In this case, specifically, 5 U.S.C. 6101(b)(2) requires an agency to arrange travel during the scheduled workweek "to the maximum extent practicable." However, this proposal would require travel during the scheduled workweek even where not practicable and is thus inconsistent with management's right to assign work.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is dismissed.3/

Issued, Washington, D.C., March 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In view of the decision herein, it is unnecessary to address the Agency's additional contentions.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ENVIRONMENTAL PROTECTION AGENCY
REGION 9

Activity

and

Case No. 0-AR-840

ENGINEERS AND SCIENTISTS OF
CALIFORNIA, MEBA, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Harvey Letter filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The parties stipulated the issue before the Arbitrator as follows:

> Did the Employer violate Article XV of the Agreement in filling the position of Underground Injection Control Team Leader in the Water Supply Section? If so, what shall be the remedy?

In a corrected award, the Arbitrator ruled in favor of the Union and directed:

> 1. In filling professional positions of Grades GS-12 and above, including Team Leader positions, that are encompassed by the "Unit Designation" which appears in Article I, Section 3 of the Parties' Labor-Management Agreement, the Employer shall implement the procedures of Article XV of the Agreement.

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In its exceptions, the Activity contends that the award is contrary to law and Government-wide regulation, and that the Arbitrator exceeded his authority. Specifically, the Activity argues that the award violates management's right under section 7106(a)(2)(C) of the Statute and FPM chapter 335, subchapter 1-4, Requirement 4, to fill positions from among properly ranked and certified candidates for promotion or from any other appropriate source. The Authority concludes that to the extent the Arbitrator's award requires the Activity to fill positions from among candidates resulting from adherence to the procedures of the parties' agreement and precludes selection from other appropriate sources, the award is contrary to section 7106(a)(2)(C) of the Statute and FPM chapter 335, subchapter 1-4, Requirement 4, and must be modified.*/ U.S. Army Infantry Center, Ft. Benning, Georgia and American Federation of Government Employees, Local 54, AFL-CIO, 12 FLRA 161 (1983).

The Activity also argues that the Arbitrator exceeded his authority when he rendered an award covering ". . . professional positions of Grades GS-12 and above, including Team Leader positions. . . ." Noting that the stipulated issue before the Arbitrator referenced only the filling of one Team Leader position, the Activity argues that the Arbitrator was without authority to render an order as to other positions. Under the facts presented, the Authority is persuaded by the Agency's argument. Indeed, the Union only sought a remedy " . . . that would require all Team Leader positions to be filled pursuant to Article XV." Under the facts presented, the Authority concludes that the Arbitrator exceeded his authority when he issued an affirmative order affecting positions and employees beyond the scope of the stipulated grievance. American Federation of Government Employees, AFL-CIO, National Immigration and Service Council and U.S. Immigration and Naturalization Service, 15 FLRA No. 76 (1984). To that limited extent, the award is also deficient and must be modified.

*/ The Activity also alleges that the Arbitrator's award violates management's right to decide not to fill the positions involved. However, on its face the award does not require that positions be filled, but rather, directs actions by management "[i]n filling. . . positions. . . ." Moreover as modified by the Authority, the award is consistent with section 7106(a)(2)(C) of the Statute and FPM chapter 335 and therefore does not compel management to fill any position should it choose to leave such position vacant. Accordingly, no basis is provided for finding the award, as modified, deficient on this ground as alleged by the Activity.

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Accordingly, the Authority modifies the award to provide the following remedy in place of that ordered by the Arbitrator:

> In filling Team Leader positions that are encompassed by the "Unit Designation" which appears in Article I, Section 3 of the Parties' Labor-Management Agreement, the Employer shall implement the procedures of Article XV of the Agreement. In addition, the filling of Team Leader positions must be in accordance with controlling law and regulation, including section 7106(a) of the Federal Service Labor-Management Relations Statute and Chapter 335 of the Federal Personnel Manual, subchapter 1-4, Requirement 4.

Issued, Washington, D.C., March 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, AND OFFICE OF HEARINGS AND APPEALS, REGION II

Respondent

and

Case No. 2-CA-20324

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1760, AFL-CIO

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the stipulation of facts, accompanying exhibits, and the parties' contentions, the Authority finds:

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it failed and refused to negotiate over the ground rules for impact and implementation bargaining concerning two management-proposed changes in conditions of employment.

The record reflects that the parties met on November 12, 1981, to commence impact and implementation negotiations concerning the opening of a new Bronx Hearing Office and the relocation of the Syracuse Hearing Office. The Union presented the Respondent with written proposals concerning the ground rules for such negotiations. In a letter dated November 30, 1981, the Respondent stated that, "It is our position that . . .[the Statute] . . . does not require the establishment of formal ground rules prior to engaging in impact and implementation negotiations." Thereafter, the Respondent took the position that while it would meet at mutually convenient times and places, it would not negotiate over the Union's ground rule proposals. Subsequent to that date, negotiations did take place over the impact and implementing procedures of the two management-proposed changes in conditions of employment.

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In a decision issued subsequent to the parties' stipulation of facts herein which involved essentially similar facts and similar positions of the parties,*/ the Authority concluded that an agency's refusal to bargain over a union's ground rule proposal based solely on its contention that it was inappropriate except during formal contract negotiations constituted a failure to fulfill its obligation to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute. Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 16 FLRA No. 126 (1984). The Authority similarly concludes herein that the Respondent's refusal to negotiate over the ground rules proposed by the Union for impact and implementation bargaining concerning management-proposed changes in conditions of employment constituted a failure to fulfill its obligation to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute. Moreover, as in Harry S. Truman Memorial Veterans Hospital, the Authority concludes that the purposes and policies of the Statute will be best effectuated by an order requiring the Respondent to bargain in good faith regarding ground rule proposals which may be submitted in connection with future negotiations.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Authority and section 7118 of the Statute, the Authority hereby orders that the Department of Health and Human Services, Social Security Administration, and Office of Hearings and Appeals, Region II, shall:

1. Cease and desist from:

(a) Refusing to bargain over ground rules proposed by the American Federation of Government Employees, AFL-CIO, Local 1760, the exclusive representative of its employees, concerning the negotiation of the impact and implementation of the opening of a new Bronx Hearing Office and the relocation of the Syracuse Hearing Office.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

*/ The Respondent argued in its brief that the Union's ground rule proposals were both a change in its past practice of bargaining and an attempt to delay the implementation of the management-proposed change in conditions of employment. Neither position was supported by facts in the stipulated record. Therefore, the Authority concludes that it is unnecessary to respond to either argument.

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(a) Bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1760, the exclusive representative of its employees, over ground rule proposals which may be submitted in connection with future negotiations conducted under the Statute.

(b) Post at its facilities in Region II copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an authorized representative of the Respondent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain over ground rules proposed by the American Federation of Government Employees, AFL-CIO, Local 1760, our employees' exclusive representative, concerning the negotiation of the impact and implementation of the opening of a new Bronx Hearing Office and the relocation of the Syracuse Hearing Office.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1760, the exclusive representative of our employees, over ground rule proposals which may be submitted in connection with future negotiations conducted under the Statute.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority whose address is: 26 Federal Plaza, Room 24-102, New York, New York 10278 and whose telephone number is: (212) 264-4934.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DIRECTOR OF ADMINISTRATION
HEADQUARTERS, U.S. AIR FORCE

Respondent

and

Case Nos. 3-CA-1700
3-CA-1791

AFGE-GAIU COUNCIL OF HEADQUARTERS
USAF LOCALS, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor[1/]

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this consolidated proceeding, including the stipulation of facts and the parties' contentions, the Authority finds:

The complaint in Case No. 3-CA-1700 alleges that the refusal of the Director of Administration, Headquarters, U.S. Air Force (the Respondent) to process a grievance over a probationary employee's termination or to participate in arbitration of the grievance constituted a failure to negotiate in good faith and a "patent breach" of the parties' negotiated agreement in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), and additionally constituted a refusal to comply with the requirements of

1/ The Regional Director granted a motion to intervene filed by the Office of Personnel Management (OPM) pursuant to section 2423.22(b)(1) of the Authority's Rules and Regulations.

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of section 7121 of the Statute[2/] in violation of section 7116(a)(1) and (8).[3/] In Case No. 3-CA-1791, it is additionally alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to grant the terminated employee's Union representative official time to represent him in his grievance.

The Respondent terminated the employment of Ronald A. Lewis, the probationary employee, on September 17, 1980. Thereafter, Lewis filed a grievance under the negotiated grievance procedure. At each step of the grievance procedure, the Respondent refused to meet with the grievant and

---

2/ Section 7121 provides in pertinent part:

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability . . . .

. . . . . .

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

. . . . . .

(3) include procedures that--

. . . . . .

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

3/ Section 7116(a)(1), (5) and (8) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(Continued)

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his Union representative and also rejected the Union's request that the grievance be submitted to arbitration, contending that the matter of Lewis' termination was not grievable. The Respondent also denied the request of Lewis' Union representative, Fred Small, for official time under the parties' negotiated agreement to represent the grievant. Small had previously been granted official time when meeting with, preparing and/or presenting appeals of terminated unit employees.

In Case No. 3-CA-1700 the Respondent concedes that it unilaterally refused to process the grievance of Lewis over his termination. The sole reason given by the Respondent for its refusal was that "such termination is part of the total examination process and as such is precluded by law from arbitration under" section 7121(c)(4) of the Statute.4/

The United States Court of Appeals for the District of Columbia Circuit recently held in Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), that a proposal to make the termination of probationary employees grievable and arbitrable under the parties' collective bargaining agreement was inconsistent with law and regulation. Thereafter, in applying the court's decision, the Authority concluded in U.S. Department of Labor, Labor Management Services Administration, Cleveland, Ohio and National Union of Compliance Officers, 13 FLRA 677 (1984),5/ "that in enacting the. . . [Statute] . . .

(Continued)

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

. . . . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

4/ Section 7121(c)(4) provides:

§ 7121. Grievance procedures

. . . . . .

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

. . . . . .

(4) any examination, certification, or appointment[.]

5/ See also Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 3342, 14 FLRA 164 (1984).

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Congress did not intend grievances and arbitration procedures negotiated under the Statute to cover grievances concerning the termination of probationary employees. . . ." Thus, in following the court's decision, the Authority concluded that grievances over the termination of probationary employees are as a matter of law not cognizable under grievance-arbitration procedures negotiated under the Statute. Therefore, it follows that an agency's refusal to proceed to arbitration of a grievance concerning the termination of a probationary employee cannot be held to be violative of the Statute. In so concluding, the decision herein must be distinguished from that in Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C., 10 FLRA 316 (1982), wherein the Authority held that a refusal by either party to participate in negotiated contractual procedures for the settlement of grievances, including arbitration of threshold arbitrability questions, would conflict with the requirements of section 7121 of the Statute and be violative of section 7116(a)(1) and (8). At the time of the holding in that case, the courts and the Authority had not concluded that as a matter of law grievances over the termination of probationary employees are excluded from the coverage of all grievance procedures negotiated pursuant to section 7121. In the instant case, the issue involves only that matter of clearly established law. Thus, the instant case presents no threshold question or any other question of interpretation or statutory construction which can legitimately be resolved by an arbitrator. Accordingly, the Authority shall dismiss the section 7116(a)(1) and (8) allegations of the complaint in Case No. 3-CA-1700. The Authority shall also dismiss the section 7116(a)(5) allegation of the complaint. Thus, even assuming that the parties' negotiated agreement purported to require the Respondent to proceed to arbitration concerning the termination of probationary employees, a matter which is subject to differing and arguable interpretations, such requirement would be contrary to law and regulation and hence unenforceable. See, e.g., Wisconsin Army National Guard and Association of Civilian Technicians, 14 FLRA 57 (1984). In a word, it would be a pointless and hollow exercise to require the parties to proceed to arbitration over an issue which, as a matter of law, is not cognizable under any grievance procedure negotiated under the Statute.

The Authority shall also dismiss the complaint in Case No. 3-CA-1791, concluding that the Respondent's denial of official time to the grievant's Union representative did not violate the Statute. In this regard, the General Counsel argued that Respondent's denial of official time to the grievant's Union representative constituted a unilateral change in an established condition of employment based upon the Respondent's past practice of granting such time for Union representatives to represent terminated unit employees. The Authority concludes that, in the circumstances of this case, there was no change in established past practice. Respondent had granted official time for Union representatives engaged in representing unit employees in grievances under the negotiated grievance procedure. Since, as a matter of law, a grievance over the termination

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of a probationary employee is not and cannot be covered by negotiated grievance procedures, it follows that Respondent's denial of official time in these circumstances was not a change of past practice with respect to official time in connection with grievances which are covered by the negotiated grievance procedure. The General Counsel also alleged that the denial of official time in these circumstances contravened section 7121 of the Statute. However, as has been established, grievance procedures under section 7121 do not cover grievances concerning the termination of probationary employees.

ORDER

IT IS ORDERED that the consolidated complaint in Case Nos. 3-CA-1700 and 3-CA-1791 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 28, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY MISSILE COMMAND
REDSTONE ARSENAL, ALABAMA

Activity

and

Case No. 0-AR-912

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 1858

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Roger C. Williams filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, the Authority is without jurisdiction to review the Union's exceptions and they must be dismissed on that basis.

Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

The matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which, in turn, applies to specified adverse actions including removals. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Since the arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions. Rather, the grievant may seek judicial review of the arbitrator's award pursuant to 5 U.S.C. § 7703.

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Accordingly, and apart from other considerations, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 29, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. O-NG-810

INTERNAL REVENUE SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents issues concerning the negotiability of two Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

> The selection of employees to perform office audits shall be made in accordance with Principles B and C of the National Redeployment Guidelines.1/ [Footnote added.]

The record indicates that these proposals were prompted by the Agency's announced plan to have employees of the Employee Plans (EP) Division conduct some employee benefit plans audits, formerly undertaken

1/ The cited principles of the Guidelines provide as follows:

> B. Placement of affected volunteers into continuing positions by reassignments or voluntary downgrades shall be made in accordance with the competitive procedures of Article 7 of the Master Agreement.
>
> C. When involuntary reassignments must be made, inverse IRS seniority of employees will play the primary role in determining which affected employees are placed in continuing positions.

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at the taxpayer's place of business, as office audits at Agency district offices. According to the Agency, "A determination by management to assign office audit work to certain EP employees who usually perform field examinations will result in those employees spending slightly more time at their assigned offices than they have spent there in the past."[2/] The Agency further states: "The performance of both the field and office audits referred to herein comes within the position description of the employees at issue."[3/] With specific reference to Union Proposal 1, the Agency maintains that application of the proposed procedures would not take into consideration the unavailibility of an employee because of involvement "in a long-term and complex field audit" and would not include as a factor in the selection process "the availability of employees based on current workload priorities and assignments . . . ."[4/]

Concerning the management right to assign work pursuant to section 7106(a)(2)(B) of the Statute, the Authority noted, in connection with Union Proposal 13, in American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Department of Justice, Immigration and Naturalization Service, 8 FLRA 347, 377 (1982), rev'd as to other matters sub nom. U.S. Department of Justice v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), that ". . . the right to assign work includes discretion to determine the particular employee to whom the work will be assigned and to determine when the work which has been assigned will be performed." While the Agency's position that Union Proposal 1 would interfere with its discretion in deciding who will undertake the office audits is unpersuasive,[5/] the Authority does agree with the Agency's assertion that the proposal would interfere with the right to determine when assigned work will be performed. That is, by prescribing the selection of employees to perform office audits without taking into consideration those employees' availability to perform such work, Union Proposal 1 would force management into one of two choices where the employees identified by application of the proposed procedures are engaged in ongoing or priority field audits. The Agency would either have to relieve the identified employees of their continuing assignments or delay the start of the office audits pending completion of the field

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2/ Agency Statement of Position at 1-2.

3. Id. at n. 4.

4/ Id. at 9 and 11.

5/ See American Federation of Government Employees, Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 15 FLRA No. 114 (1984), wherein the Authority held that a proposal, setting forth a procedure to be used by management in choosing among employees already deemed by management to be qualified for an assignment, was negotiable.

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assignments. Thus, the proposal, in certain circumstances, would affect management's discretion regarding the timing of the assignment of work to employees, and is, for the reasons set forth concerning Union Proposal 13 in Immigration and Naturalization Service, outside the Agency's obligation to bargain.

Union Proposal 2

> Where the NTEU Chapter President or Steward is assigned to EP/EO field work, he/she shall be given the opportunity to work office/correspondence examinations before volunteers are solicited, absent just cause.

Union Proposal 2 differs from Union Proposal 1 in that, as the Union points out, the "just cause" provision encompasses circumstances where the Union officials "due to their present work assignments, cannot be called back to the office without causing a severe interruption of the [Agency's] workload."[6/] However, Union Proposal 2 is to the same effect as Union Proposal 7 in American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982), which similarly sought preferential treatment in the assignment of work to union officials. Noting that the right, pursuant to section 7106(a)(2)(B), includes authority "to assign work to all employees, regardless of whether they are Union officials and regardless of whether they consent," the Authority found the cited proposal to be nonnegotiable. Therefore, based on U.S. Marshals Service, and the reasons and cases cited therein, Union Proposal 2 is not within the duty to bargain.[7/]

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 4, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr. Member

FEDERAL LABOR RELATIONS AUTHORITY

6/ Union Petition for Review at 2.

7/ See also 5 U.S.C. § 7116(a)(2).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2502

Union

and

Case No. 0-AR-296

U.S. DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEM,
FEDERAL CORRECTIONAL INSTITUTION

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Samuel H. Jaffee filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this case concerns the failure of the grievant's supervisor to recommend the grievant for a career-ladder promotion to GS-11. A grievance was filed and submitted to arbitration claiming that the grievant's failure to be promoted was without reasonable cause and requesting that she be promoted to GS-11 retroactive to the date she became eligible for promotion. The Arbitrator expressly determined that the failure to recommend the grievant for promotion, or in other words the recommendation not to promote the grievant, was "arbitrary in a legal sense." Although the Arbitrator specifically acknowledged testimony that employees in career ladders are not automatically promoted when they meet the eligibility requirements for the higher-grade position, the Arbitrator found that in his judgment, no valid reason had been given for not recommending the promotion of the grievant. In this respect the Arbitrator refused to credit testimony of the grievant's supervisor that the grievant was not recommended for promotion because the grievant was deficient in her knowledge of technical aspects of case management, as well as deficient in her writing skills. Instead, the Arbitrator concluded that the grievant was not recommended for promotion solely because of a claimed deficiency in writing skills. Finding that the grievant was not deficient in writing skills, the Arbitrator ruled that in his judgment, she was clearly worthy of promotion to GS-11. Accordingly, the Arbitrator directed that the grievant be promoted with backpay retroactive to the date on which she was eligible for promotion.

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As one of its exceptions, the Agency contends that the award of retroactive promotion with backpay is contrary to the Back Pay Act, 5 U.S.C. § 5596. Specifically, the Agency argues that in the circumstances of this case, the award of retroactive promotion and backpay is not authorized by the Act. The Authority agrees.

The Authority has consistently held in cases involving a failure to promote that in order for an award of retroactive promotion and backpay to be authorized, there must be both a determination that the grievant was affected by an unjustified and unwarranted personnel action and a determination that such unwarranted action directly resulted in the denial of a promotion to the aggrieved employee that the employee would otherwise have received. E.g., American Federation of Government Employees, Local 2811 and U.S. Government District Office, Social Security Administration, St. Paul, Minnesota, 7 FLRA 618 (1982). In terms of this case, the Authority concludes that the Arbitrator has not made the findings necessary to a proper award of retroactive promotion and backpay. The Arbitrator's findings that the failure to recommend the grievant's career-ladder promotion was arbitrary and that in the Arbitrator's judgment the grievant was worthy of promotion do not constitute the requisite finding that but for the arbitrary action of the grievant's supervisor, the grievant would definitely have received a career-ladder promotion on her eligibility date. In view of the Arbitrator's acknowledgment that employees in career ladders are not automatically promoted when they meet the eligibility requirements for the higher-grade position, the Arbitrator's finding that the failure to recommend the grievant for promotion was arbitrary plainly does not constitute the requisite finding that the grievant was affected by an unwarranted action that directly resulted in the denial of a promotion that the grievant otherwise would definitely have received. See id. at 620-21; Local R4-97, National Association of Government Employees and Naval Mine Engineering Facility, Yorktown, Virginia, 5 FLRA 452, 456 (1981). Likewise, the Arbitrator's finding that in his judgment the grievant was worthy of promotion plainly does not constitute the requisite finding that but for the unwarranted action, the responsible agency officials would have considered the grievant worthy of promotion and would originally have promoted the grievant, especially in view of the testimony that the grievant's deficiencies were more extensive than

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writing ability alone. See SSA, St. Paul at 620-21. Therefore, the award is deficient is contrary to the Back Pay Act and is set aside.*/

Issued, Washington, D.C., April 4, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision, it is not necessary for the Authority to address the Agency's other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION AND
SOCIAL SECURITY ADMINISTRATION
FIELD OPERATIONS, NEW YORK REGION

Respondent

and

Case No. 2-CA-30220

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Charging Party filed exceptions to the Judge's decision.*/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

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*/ The Charging Party excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

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ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-30220 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 4, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION AND SOCIAL SECURITY ADMINISTRATION, FIELD OPERATIONS, NEW YORK REGION, Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Charging Party/Union	Case No.: 2-CA-30220

Daniel H. Green,
Representative for Respondent

Robert J. Fabii,
Counsel for the General Counsel,
Federal Labor Relations Authority

Cecelia McCarthy,
Representative for the Charging Party/Union

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. 7101 et seq. (Supp. V, 1981), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the "Statute", and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

On January 21, 1983, the Charging Party/Union filed a charge of an unfair labor practice against Respondent. The charge was amended on June 27, 1983. The General Counsel of the Federal Labor Relations Authority ("Authority") investigated and, on June 30, 1983, served the complaint initiating this proceeding. On July 19, 1983, an amended complaint was served.

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The complaint alleges that, on or about December 17, 1982, an agent of Respondent conducted a staff meeting with all part-time permanent employees to discuss general conditions of employment in the Baychester, Bronx, New York Branch Office, without affording the exclusive representative proper notice or the opportunity to be present in its institutional capacity, in violation of Section 7116(a)(1), (5) and (8) of the Statute.1/

Respondent denies the charges.

On August 17, 1983, a hearing was held in New York City. The parties appeared, adduced evidence, and examined witnesses. Briefing time was extended until October 28, without objection and upon a showing of good cause by Respondent. The General Counsel filed a brief on October 27. Respondent filed its brief on October 28. Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I make the following findings of fact and conclusions of law and recommend entry of the following order.

1/ 5 U.S.C. 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . .
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . or
> >
> > (8) to otherwise fail or refuse to comply with any provision of this chapter.

One such provision is found at 5 U.S.C. 7114(a), which provides in pertinent part, that:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment. . . .

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Findings of Fact[2/]

1. It is admitted that, at all times material herein, the Charging Party has been and is a labor organization, within the meaning of the Statute, and that it has been and is now the certified exclusive representative of a consolidated unit of certain employees of Respondent, including all employees employed in the District and Branch Offices of the Social Security Administration ("SSA") in the States of New York and New Jersey, with certain exceptions not here relevant.

2. It is admitted that, at all times material herein, the National Council of SSA Field Operations Locals ("Council") has been delegated authority, by the Charging Party, to act as its representative for the purpose of collective bargaining on behalf of unit employees in SSA Field Operations, including SSA's Baychester, Bronx, New York Branch Office, and that Local 3369 has acted as the agent of the Council and been recognized by Respondent as such, at the Baychester Office.

3. It is admitted that, at all times material herein, SSA has been and is an agency within the meaning of the Statute, and that SSA Field Operations, New York Region has been and is a constituent entity within the Department of Health and Human Services ("DHHS"), SSA.

4. It is conceded that a meeting held on or about December 17, 1982, was a "formal discussion" within the meaning of 5 U.S.C. 7114(a)(2)(A). See TR 4. The parties agree that the sole issue is whether specific notice of the meeting, and an opportunity to attend it, was accorded the Union. See TR 5-7.

5. For about four years, Philip Kalmis has been the representative of Local 3369 at the Baychester Branch Office, where he has been employed as a claims representative for six years. The alternate representative is Robin Woodley. Ms. Woodley is a part-time permanent clerical who works for Mr. Kalmis, and whose desk is located beside his. As the representative for Local 3369, Mr. Kalmis is the person authorized to be given notice of formal meetings to be held with employees, and to discuss labor management relations on behalf of the employees and the Union. As the alternate representative, Ms. Woodley holds the same authority, in the absence of Mr. Kalmis. It is "assumed" that Ms. Woodley acts for Mr. Kalmis when he is "not at work, or not available," or is "[a]bsent from the room" (TR 83).

2/ The following abbreviations will be used. "GC" refers to exhibits of the General Counsel. "R" refers to the exhibits of Respondent. "Jt" refers to the joint exhibits of the parties. Multipage exhibits will be referenced by exhibit number, followed by page numbe.. "GCBr" refers to the brief of the General Counsel. "RBr" refers to the brief of Respondent. "TR" refers to the transcript.

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6. Golden Webb has been the branch manager of the Baychester Office since July 1980 and meets, on occasion, with Mr. Kalmis acting as the representative of Local 3369.

7. On December 13, 1982,[3]/ Mr. Kalmis requested official time to meet with Mr. Webb to discuss some issues. Mr. Kalmis did so by presenting an official time form to his immediate supervisor, Daniel Heading, who approved it on December 13. See GC 2. The meeting was originally requested for December 14 or 15, and was later changed to Thursday, December 16.

The December 16 Meeting

8a. From 4 to 5 p.m., on Thursday, December 16, Mr. Kalmis and Mr. Webb met and discussed the union's agenda items mentioned on the official time form. These items were: sanitized appraisals being broken into groups of Title 2 and Title 16 claims representatives; awards; union presence at employee orientation sessions; and a conversion chart for use in determining points for promotion.

8b. Mr. Webb had not presented any agenda items, in advance, for discussion at the December 16 meeting; but he did bring up one at the meeting based upon his receipt, at about 1 p.m. on that day, of a teletype from the New York Regional Office. The teletype called for an immediate freeze affecting part-time employees in the office, to be made effective on Monday, December 20. The teletype required Mr. Webb to disallow any work over established tours of duty and any increase in hours of duty. See GC 3. A copy of the teletype was placed in Mr. Kalmis's in-basket immediately upon receipt, but was not observed by Mr. Kalmis prior to the 4 p.m. meeting.

8c. Mr. Webb was positive that the teletype was the first item discussed "because of the importance of it and the effect it was going to have on the part-time permanent employees" (TR 98). Mr. Kalmis was uncertain as to the order of discussion. In view of the immediacy of the problem presented by the teletype, it is logical that it would be discussed first. Accordingly, I find that it was the first item discussed.

8d. The discussion of the teletype lasted for at least 20 to 25 minutes, during which time Mr. Kalmis expressed his concern about how the teletype would impact upon the employees. The testimony of Mr. Webb and Mr. Kalmis varied, in several respects, as to what transpired during this discussion. One variation is the subject of another unfair labor practice charge, and concerns what was said about future negotiations over the

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[3]/ All dates hereinafter mentioned are in 1982, unless otherwise specified.

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change represented by the teletype. As to the charge here at issue, Mr. Webb testified that he advised Mr. Kalmis that he would meet with the part-time permanent employees the next morning, Friday, December 17, to advise them of the freeze, and to solicit volunteers for changing hours in order for all office units to be covered by clerical help during office hours. (Most of the office clerical force was in a part-time permanent status and had originally been hired to work 32 hours a week, but had been allowed to work a full 40-hour week.) Mr. Webb testified that he advised Mr. Kalmis that he (Mr. Kalmis) had a right to be present at the meeting, and that Mr. Kalmis indicated that he would be present by nodding his head, in response. Mr. Webb gave his testimony in a careful, honest, and positive manner.

8e. Mr. Kalmis testified that Mr. Webb did not give him notice that there would be a meeting the next morning and that he learned about it only after it had occurred, from one of the clericals. While Mr. Kalmis appeared to be an honest witness, he also seemed to be an excitable and somewhat garrulous person who might have missed some points Mr. Webb was making at the December 16 meeting. After all, Mr. Kalmis had asked for the meeting in the first place, had a full agenda of items to discuss, and was probably distracted by the unexpected need to engage in a lengthy discussion about the part-time permanent employees. The fact that Mr. Webb observed Mr. Kalmis nodding his head, when told about the meeting which was to be held the next morning, may not have been acknowledgement of the notice at all.

8f. Mr. Kalmis admitted that Mr. Webb did give him prior notice of formal discussions, in "[m]ost situations" (TR 51).

8g. Based upon findings 8d, e and f, I find that Mr. Webb, at the December 16 meeting, did give Mr. Kalmis notice of the meeting to be held the next morning with the part-time permanent employees;[4]/ but that Mr. Kalmis did not hear it.

The December 17 Meeting

9a. On the morning of December 17, Mr. Webb notified five part-time permanent employees of a meeting to be held immediately. At 8:35 a.m. at the latest, Mr. Webb stopped by the desk of Ms. Woodley and told her that "we were having a meeting and her presence was wanted" (TR 125). Mr. Webb observed Mr. Kalmis sitting at his desk, at the time, and was of the

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4/ Both Mr. Webb and Mr. Kalmis made notes of the December 16 meeting. Those of Mr. Webb indicated that he gave such notice. Those of Mr. Kalmis mention no notice being given. Because of their self-serving nature, I have not relied on either set of notes in reaching this finding.

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opinion that Mr. Kalmis "noticed [him] when [he] walked by" (TR 126).[5] Mr. Webb did not tell Ms. Woodley the purpose of the meeting. She attended it as a part-time permanent employee, and not in her capacity as the alternate union representative. She was the only one to volunteer to change her hours of work.

9b. The December 17 meeting began in the multi-purpose room no later than 8:45 a.m. and ended shortly after 9 a.m.[6] It is customary for all staff meetings to begin at 8:30 a.m. and end by 9 a.m., when claimant interviewing begins. This half-hour period is the "reading period" for employees (TR 116). It is also customary for all staff meetings to be held in the multi-purpose room, which is located adjacent to the area where Mr. Kalmis works and a short distance from his desk. See R 1 and TR 119-129.

9c. Mr. Kalmis did not attend the "formal discussion" on December 17. Mr. Webb conceded that Mr. Kalmis usually attended formal discussions of which he had notice; but explained that Mr. Webb made his own decision to attend or not attend. See TR 135-138. The only instance given by Mr. Webb of nonattendance was when Mr. Kalmis attended the first meeting on appraisals, but chose not to attend subsequent meetings "on the same issue" (TR 138).

Discussion and Conclusions

The parties basically agree that the outcome of this case depends upon a credibility determination -- whether Respondent's agent gave the Union's agent prior notice of the formal discussion held on December 17. See, e.g., TR 6 and 60. This issue has been resolved in favor of Respondent. See finding 8g, supra. While Respondent's agent did not specifically notify the Union's agent of the place and time of the meeting, this was not fatal, on this record, which shows that it was the practice, in the Baychester Office, to hold staff meetings during the morning reading period, before claimant interviewing begins, and in the multi-purpose

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[5] Mr. Webb conceded that Mr. Kalmis did not acknowledge his presence in any way. Mr. Kalmis could not specifically recall seeing Mr. Webb, at this time, but did not deny that he may have. Mr. Kalmis explained that he sees Mr. Webb every morning, as they occupy a small office of which Mr. Webb is its manager.

[6] Mr. Webb so testified. Ms. Woodley testified only that the meeting was held in the morning of December 17. Mr. Kalmis testified that he thought the meeting was held at 10:30, but based his testimony on second-hand knowledge. I find that Mr. Webb was the more credible witness, on this point.

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room. See finding 9b, supra. The meeting here at issue was held at the customary time in the customary place. The Union's agent, who has worked in the Baychester Office for six years, would know of this practice.

In view of this conclusion, it is unnecessary to resolve other issues raised by the parties.

Ultimate Findings and Recommended Order

The General Counsel has not demonstrated, by a preponderance of the evidence,[7] that the alleged violations of the Statute occurred.

Accordingly, it is hereby ORDERED, that the complaint be, and it hereby is dismissed.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: November 8, 1983
Washington, DC

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[7] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
AIR FORCE LOGISTICS COMMAND
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 7-CA-535

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1592, AFL-CIO

Charging Party

DECISION AND ORDER

The Chief Administrative Law Judge issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Chief Judge further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of the complaint as to those allegations. Thereafter, the General Counsel filed exceptions to the Chief Judge's Decision, and the Respondent filed an opposition to the General Counsel's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Judge's Decision and the entire record, the Authority adopts the Chief Judge's findings, conclusions and recommended Order, as modified herein.

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The Authority adopts the Chief Judge's findings and conclusion that the Respondent violated section 7116(a)(1) and (5) of the Statute,[1/] as it was obligated to bargain over the impact and implementation of its decision to discontinue its past practice of paying employees on the overtime graveyard shift for duty-free meal breaks. The Authority also finds in agreement with the conclusion of the Chief Judge that the Respondent had no obligation to bargain over its decision to eliminate the 20 minute paid duty-free meal break on its overtime graveyard shift. The Respondent based its refusal to bargain over its decision in this regard on, inter alia, 5 U.S.C. § 5544,[2/] which deals with overtime

1/ Section 7116(a)(1) and (5) states in pertinent part:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

2/ 5 U.S.C. § 5544 provides in pertinent part:

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 hours a week.

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rates and provides that employees are "entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 hours a week." Thus, the Authority finds that inasmuch as employees on the overtime graveyard shift did not work during their meal periods, payment for such work would be contrary to law, i.e., 5 U.S.C. § 5544.3/ Therefore, the Authority finds that the Respondent had no obligation to bargain involving the decision to eliminate the 20 minute paid duty-free meal break. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982).

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1. Cease and desist from:

(a) Discontinuing the practice of paying employees assigned to overtime graveyard shifts for the time spent on duty-free meal breaks, without first notifying the American Federation of Government Employees, Local 1592, AFL-CIO, the employees' exclusive representative, and affording it an opportunity to bargain concerning the impact and implementation of such action.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate with the American Federation of Government Employees, Local 1592, AFL-CIO, the exclusive representative of its employees, concerning the impact and implementation of discontinuing the practice of paying employees assigned to overtime graveyard shifts for the time spent on duty-free meal breaks.

3/ Based on the disposition of this case, it is unnecessary to pass upon the comments made by the Chief Judge concerning the absence of a determination by the Authority that no compelling need existed for Air Force Regulation 40-610. But see Defense Logistics Agency (Cameron Station, Virginia), 12 FLRA 412 (1983), aff'd sub nom. Defense Logistics Agency, et al. v. FLRA, No. 83-2017 (D.C. Cir. Feb. 15, 1985) (wherein the Authority determined that a compelling need determination may be made in the context of unfair labor practice proceedings).

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(b) Post at its facilities at Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Air Logistics Center, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the remaining allegations of the complaint found to be without merit be, and they hereby are, dismissed.

Issued, Washington, D.C., April 4, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discontinue the practice of paying employees assigned to overtime graveyard shifts for the time spent on duty-free meal breaks without notifying the American Federation of Government Employees, Local 1592, AFL-CIO, the exclusive representative of our employees, and affording it an opportunity to bargain concerning the impact and implementation of such action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, negotiate with the American Federation of Government Employees, Local 1592, AFL-CIO, the exclusive representative of our employees, concerning the impact and implementation of discontinuing the practice of paying employees assigned to overtime graveyard shifts for the time spent on duty-free meal breaks.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF THE AIR FORCE AIR FORCE LOGISTICS COMMAND OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1592 Charging Party	Case No.: 7-CA-535

Clare A. Jones, Esq.
S. Reed Murdock, Esq.
For the Respondent

James J. Gonzales, Esq.
For the General Counsel

William E. Wade
James R. Rosa, Esq.
On Brief: Joe Goldberg, Esq.
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.) and the Final Rules and Regulations issued thereunder (5 C.F.R. § 2423.14 et seq.). It is based on a Stipulation of Facts submitted by the parties following issuance of a Complaint by the Regional Director of Region VII, Federal Labor Relations

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Authority. At issue is whether Respondent violated Sections 7116(a)(1) and (5) when it unilaterally discontinued its practice of providing employees on the overtime graveyard shift with a 20-minute paid meal break, substituting therefor a 30-minute unpaid meal break.

The Facts

The employees assigned to the eight-hour graveyard shift of Respondent's Metal Processing Shop were, until February 22, 1980, provided with a paid, 20-minute meal break. On that day, Respondent instituted, for employees on the irregularly scheduled overtime graveyard shift an eight and one-half hour tour of duty which included a 30-minute unpaid meal break. Employees on the regular (non-overtime) graveyard shift continued to receive a paid meal break. Respondent discontinued the overtime paid break without notice to the Union, thus depriving it of any "reasonable opportunity to request bargaining over substance, impact and/or implementation" of the change. Such meal breaks were never permitted to be taken "at or near the work station" because of safety and health hazards arising from the chemicals used.

Air Force Regulation 40-610 (1971) provides, in relevant part:

> Lunch (or other meal) periods, during which the employee is entirely free of the duties of his position are not considered as duty time for which compensation is paid. When more than one 8-hour shift is in operation during a 24-hour period and an overlapping of shifts to permit time off for lunch is not feasible, an on-the-job lunch period of 20 minutes or less may be authorized and included in the regular scheduled tour of duty. Workers must spend their on-the-job lunch period at or near their work stations. Under these conditions, the time covered by the 20 minutes on-the-job lunch period is compensable. Where one or two shifts are in operation, the supervisor generally schedules time for lunch apart from the hours of duty. Duty free lunch periods during periods of overtime work are not compensable time. (Emphasis supplied)

Discussion and Conclusions

The General Counsel asserts that Respondent violated its duty to negotiate with the Union as to the substance, impact and implementation of its decision, and requests that a status quo ante order be entered which would require Respondent to maintain the preexisting schedule "until such time as a modification of that schedule is mutually agreed upon with the Union or ordered modified by lawful authority pursuant to the Statute". The Charging Party, pointing inappropriately to four cases involving Respondent which were resolved by settlement as evidence of past

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violations,[1] seeks payment of wages it asserts were wrongfully withheld as well as restoration of the status quo ante.[2]

Respondent virtually concedes that a violation occurred, but argues that the change was required by law (5 U.S.C. 5542(a) and 5544) and regulation, and that there existed mitigating factors (not reflected in the Stipulation and hence disregarded,) which militate against such a finding. The real thrust of its argument is that a return to the status quo ante would require it to resume an unlawful course of conduct under 5 U.S.C. 5542(a) and 5544 as construed in Rapp v US, 340 F.2d 635, 167 Ct. Cl. 852 (1964), Ayres v U.S. 186 Ct. Cl. 350 (1968), and Comptroller General Decisions to be found at 42 CG 195, 46 CG 217 and 47 CG 358. These cases construed 5 U.S.C. 911 and 913, forerunners of Sections 5542 and 5544, which are identical in relevant respect. They are cited for the proposition that overtime spent in or available for, eating or sleeping, is "generally" noncompensable, even though the employee is required to be on the employer's premises. The Court in Rapp observed that, "(t)his rule is now well established. The exception . . . is where substantial labor is performed in the time set aside for sleeping and eating." This Stipulation does not indicate that these employees had any work to do in their meal period; rather the fact that meals were not to be taken near the work site suggests strongly that such time was duty-free.

The General Counsel and the Union argue that the U.S. Code provisions do not explicitly speak to the subject of paid, duty-free meal breaks on overtime, and therefore, neither preclude such practice nor justify its unilateral abandonment.[3] They also contend that the Air Force Regulation provides no defense because it is not Government-wide and does not, in any event, clearly prohibit Respondent's past practice.

Air Force Regulation 40-610 states in clear and unmistakable terms that duty-free meal breaks during overtime periods are not compensable. Whether or not backed by the force of law, it is a rule or regulation of a primary national subdivision of an agency, (the Department of Defense). As such, under the scheme set forth in Section 7117, it can have the same effect as a Federal law or a Government-wide regulation, operating to

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[1] Willingness to settle is, of course, no evidence of violative conduct. U.S. Department of the Air Force, Norton Air Force Base, 3 A/SLMR 176; Poray, Inc., 143 NLRB 617.

[2] While there is no indication that the salaries or wages earned each day were changed, the addition of twenty minutes to the time actually worked constitutes a reduction of about 5% in the effective hourly rate.

[3] They do not address the Court of Claims and Comptroller General Decisions relied upon by Respondent.

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remove the obligation to bargain from matters which are the subject of the regulation.[4] Thus, the effect of subsection (a)(3) is to create a bar to negotiations concerning any subject matter which would create a conflict with a rule or regulation of a primary national subdivision of an agency, absent a determination by the Authority that there exists no compelling need for such rule or regulation, unless the union represents a majority of the employees of the primary national subdivision to whom the regulation applies.[5] There is here no evidence that either of these conditions, which would serve to render the decision herein a bargainable one, was met. It follows that, on this record, the duty to bargain did not extend to the issue of compensation for duty-free meal breaks on overtime, and that the decision to end a practice contrary to the Regulation was a privileged one.

There remained however, the obligation to afford the Union a reasonable opportunity to bargain over the so-called impact and implementation of its decision, an obligation which Respondent admits it did not discharge. The Authority has held, even where a unilaterally

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[4] Section 7117 subsections (a)(1), (2) and (3) provides as follows:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

[5] See the analysis of the Statute and its legislative history by Judge Arrigo in Boston District Recruiting Command et. al., OALJ-81-023.

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discontinued practice was illegal, that there was an obligation to bargain "to the extent consonant with law and regulation, concerning the impact of such required change and, where possible, concerning the implementation thereof" even though such obligation would not "justify delay in correcting the unlawful past practice".[6/] Respondent therefore violated Sections 7116(a)(5) and (1) by depriving the Union of an opportunity to negotiate about the consequences of its decision.

The request for restoration of the status quo ante is, in my judgement, inappropriate in the circumstances. While the Authority has ordered a return to the status quo ante where the violation found was limited to the failure to engage in impact and implementation bargaining over the consequences of a decision which was not itself negotiable, it has not done so where the employment practice ordered reinstituted would contravene Federal law or Government-wide regulation.[7/] Rather, it has done so where the change resulted from the exercise of rights reserved to management under Section 7106.[8/] The fact that the Authority, in U.S. Geological Survey, supra, acknowledged that the obligation to engage in impact bargaining would not justify delay in correcting an unlawful practice, and that bargaining about implementation may not be possible, is a rather clear indication that it would not order a return to an illegal status quo ante. The more troublesome question is whether such a remedy can or ought to be employed where it would compel an agency or activity to disregard, for whatever period of time is necessary to discharge its obligation to bargain in good faith, a regulation which it is otherwise required to obey.[9/] I conclude that conflict with a regulation does not, per se, render the remedy unavailable, but that it should nevertheless not be used in this case. This recommendation is based on two considerations. First, and most importantly, this record leaves unclear (and unclarifi-

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[6/] Department of the Interior, U.S. Geological Survey, 9 FLRA 543, 546 at fn. 9. But see Department of the Navy, Portsmouth Naval Shipyard, 5 FLRA No. 48, which appears to have been overruled, sub silentio, in U.S. Geological Survey.

[7/] Portsmouth Naval Shipyard is an apparent exception.

[8/] See San Antonio Air Logistics Center, 5 FLRA No. 22; Norfolk Naval Shipyard, 6 FLRA No. 22; and the discussion of this matter in Federal Correctional Institution, 8 FLRA 604.

[9/] Analytically, I see no difference for present purposes between a Government-wide regulation, and one issued by an agency or a primary national subdivision of an agency, where the conditions for making the latter two bars to negotiation have been met (see Section 7117(a)(2) and (3)). They are then legally equivalent.

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able) the question whether the regulation at issue is not, in fact, required by law. Imposition of the remedy may therefore collide with other law. Second, the Stipulation makes it impossible to apply the criteria set forth by the Authority for determining the appropriateness of a status quo ante order.10/ Thus, we do not know about the willfulness of the agency's conduct (there is, in fact, no reason to believe it was not entirely motivated by the desire to obey the law), nor do we know the nature and extent of the impact on adversely affected employees.

As noted, the Union requests backpay. That remedy has been ordered by an Administrative Law Judge for a violation of Section 7116(a)(5) where there existed a duty to bargain regarding the substance of a change in employment conditions.11/ The purpose of backpay is, of course, to make whole employees for loss of salary or wages caused by violations of law. Here, the failure to engage in impact and implementation bargaining, although a violation of law, did not cause the reduction in wages. Rather, the reduction resulted from the enforcement of a regulation which privileged, (and, if backed by law, required), that change. There was therefore no wrong to be remedied with a backpay order.

Having concluded that Respondent violated Section 7116(a)(5) and (1) by its failure to afford the Union a reasonable opportunity to bargain concerning the impact and implementation of its decision to terminate the practice of paid meal breaks on overtime, I recommend that the Authority issue the following order:

ORDER

Pursuant to Section 7118 of the Statute and Section 2423.29 of the Authority's Rules and Regulations, the Authority hereby orders that the Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1. Cease and desist from:

(a) Discontinuing the practice of paying employees assigned to overtime shifts for the time spent in duty-free meal

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10/ Federal Correctional Institution, 8 FLRA 604.

11/ GSA, National Capital Region, Case No. 3-CA-1991, Administrative Law Judge Decisions Report No. 14. (That decision, under Section 2423.29(a) of the Authority's Rules and Regulations, is of no precedential significance.) But see Portsmouth Naval Shipyard, 5 FLRA No. 48, where the Authority ordered a return to the status quo ante, but did not order backpay "in view of the discretionary nature of the past practice involved and the lack of any specific evidence as to support a backpay award. . ."

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breaks, without first affording American Federation of Government Employees, AFL-CIO, Local 1592, the employees' exclusive bargaining representative, an oppportunity to negotiate upon request, with respect to the procedures which management will observe in implementing such changes and concerning appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify and, upon request, bargain with American Federation of Government Employees, AFL-CIO, Local 1592, concerning the procedures to be observed in implementing the change in the practice respecting payment for duty-free meal breaks on overtime and concerning appropriate arrangements for employees adversely affected by such change.

(b) Post at its facilities at Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Air Logistics Center, or his designee, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places when notices to employees are customarily posted. The Commander shall take reasonable steps to insure that the notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Acting Regional Director, Region VII, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is further ORDERED that the complaint in 7-CA-535 in all other respects be, and it hereby is, dismissed.

JOHN H. FENTON
Chief Administrative Law Judge

Dated: January 19, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the practice of paying employees for duty-free meal breaks on overtime without first affording the American Federation of Government Employees, AFL-CIO, Local 1592, the employees' exclusive bargaining representative, upon request, an opportunity to negotiate with respect to the procedures which management will observe in implementing such changes and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL notify and bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1592, upon request, concerning the procedures to be observed in implementing the changed meal break practice, and concerning appropriate arrangements for employees adversely affected by such change.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 1531 Stout Street, Denver, Colorado, 80202, and whose telephone number is: (303) 837-5224.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HARRY S. TRUMAN MEMORIAL VETERANS HOSPITAL, COLUMBIA, MISSOURI

Respondent

and

Case No. 7-CA-628

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3399

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the parties' stipulation of facts, accompanying exhibits, and the contentions of the parties, the Authority finds:

The amended complaint herein alleges that the Respondent, Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute),1/ when it denied a request made by the Charging

1/ Section 7116(a)(1) and (5) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

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Party, American Federation of Government Employees, AFL-CIO, Local 3399 (the Union), to negotiate the subject of official time for the Union to prepare for negotiations resulting from mid-term changes in personnel policies, practices, and matters affecting employees' working conditions proposed by the Respondent.

On February 28, 1980, the unit of Respondent's employees exclusively represented by the Union became part of a nationwide consolidated unit represented by the National Veterans Administration Council, American Federation of Government Employees (AFGE).2/ On April 21, 1980, an interim memorandum of agreement was entered into between the newly certified exclusive representative of the nationwide unit and the Respondent. Article 5 of that agreement allowed constituent union locals, of which AFGE Local 3399 was one, and local Agency facilities to continue then-pending negotiations for collective bargaining agreements covering the local facilities. However, it did not allow such local negotiations, excluding impasses, to continue past May 30, 1980. Article 6 of the interim agreement provided further that "[a]ny local changes in personnel policies, practices or other matters affecting conditions of employment initiated by VA management at its local facilities, which are not covered by a local agreement, shall be submitted to local union representatives."

From 1979 through May 30, 1980, the Union and Respondent were involved in the negotiation of a local collective bargaining agreement. On or before June 15, 1980, Respondent and the Union submitted numerous items to the Federal Service Impasses Panel (the Panel). The items submitted to the Panel did not include provisions concerning official time for Union negotiators to prepare for either mid-term or renewal contract negotiations, nor was this a subject of the negotiations between the parties during the term of their bargaining.

Prior to June 9, 1980, the Union had been advised by the Respondent that certain changes in personnel policies, practices, and matters affecting employees' working conditions would be taking place separate and apart from items addressed during negotiations for the collective bargaining agreement and not including the issue of preparatory time for either mid-term or contract negotiations. In a letter dated June 9, 1980, the Union requested to meet with management representatives to negotiate the use of official time to prepare for negotiations over the above mid-term items. By letter dated June 17, 1980, Respondent refused the Union's request to negotiate concerning official time for the purpose of preparing for mid-term negotiations. The Union reiterated its request for negotiations over preparatory time for mid-term negotiations by letter dated June 18, 1980. The Respondent again denied the request by

2/ Such consolidated unit was certified in Veterans Administration, Washington, D.C., Case No. 22-08518(UC) (1980).

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letter dated June 20, 1980, asserting that it did not have an obligation to bargain over the Union's unilaterally-initiated proposal concerning preparatory time for mid-term negotiations.

The complaint raises the question of the Union's right to negotiate for official time to prepare for mid-term bargaining on issues presented by management. The Respondent contends that it has no obligation under section 7131(d) of the Statute[3/] to negotiate over official time in the circumstances, which it characterizes as a union-initiated proposal outside the context of contract negotiations. However, management's notice to the Union of proposed mid-term changes in employees' conditions of employment clearly gave rise to a duty to bargain over such proposed changes, and it is well established that a union has the right under section 7131(d) to negotiate concerning official time to prepare for such bargaining.[4/] Therefore, the Respondent's contention that it had no

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3/ Section 7131(d) provides:

§ 7131. Official time

. . . . .

(d) Except as provided in the preceding subsections of this section--

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

4/ See Environmental Protection Agency, 16 FLRA No. 87 (1984), appeal docketed, No. 85-1057 (D.C. Cir. Jan. 28, 1985), wherein the Authority adopted the Judge's finding that an activity violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over ground rules, including the amount of official time that union negotiators would be granted to prepare for negotiations, in connection with management's decision to implement new performance standards applicable to bargaining unit employees. See also American Federation of Government Employees, AFL-CIO and U.S. Environmental Protection Agency, 15 FLRA No. 96 (Union Proposal 2) (1984); Federal Uniformed Firefighters, Local F-169 and U.S. Army Armament Research & Development Command, Dover, New Jersey, 3 FLRA 317 (1980); Social Security Administration, 13 FLRA 112 (1983).

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duty to bargain concerning the Union's request for official time to prepare for negotiations because such request was a separate proposal outside the context of required bargaining must be rejected. Rather, the Union's request was precipitated by and directly related to the Respondent's proposed changes in unit employees' conditions of employment. Indeed, the request was to negotiate for official time to prepare for the very impact negotiations which would be the Union's right pursuant to management-initiated changes.5/

Similarly unpersuasive is the Respondent's contention that even if it were obligated to negotiate in these circumstances, it was precluded from doing so by the memorandum of agreement between the Veterans Administration and AFGE at the consolidated level of exclusive recognition. Thus, it argues that the proposal to negotiate official time to prepare for bargaining, made on June 9, 1980, was after May 30, 1980, the date beyond which local negotiations over existing collective bargaining agreements would no longer be permitted under the memorandum. Official time to prepare for the negotiations herein, however, does not concern the existing collective bargaining agreement. Rather, time to prepare for bargaining was a proposal directly and specifically related to issues initiated by the Respondent in June 1980, presumably under Article 6 of the interim agreement which specified that changes in conditions of employment initiated by local VA management and not covered by local agreement were to be submitted to local union representatives.

Moreover, the Respondent's contention that the existing agreement "fully incorporated" the "parameters of official time" and its suggestion that there is thus no duty to negotiate over official time to prepare for bargaining because that is not mentioned specifically in the contract, cannot be sustained. Thus, as noted, the issue of preparation time herein is related to the proposed changes initiated by the Respondent and, unless specifically precluded by the negotiated agreement, is itself a negotiable matter concerning which the Union had the right to bargain under section 7131(d) of the Statute. Absent a clear and unmistakable expression of such intent, a party will not be deemed to have waived a statutory right such as that granted by section 7131(d) to negotiate official time as herein. See Library of Congress, 9 FLRA 427 (1982); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981).

5/ In so concluding, the Authority notes that there is neither a contention nor any indication in the record that the Respondent's refusal to negotiate over official time to prepare for negotiations was based on its need to implement the changes in question without delay. Moreover, there is no basis for a conclusion herein that the Union's request to bargain for official time to prepare for negotiations was intended to create or would have resulted in such a delay. Environmental Protection Agency, 16 FLRA No. 87 (1984), supra n. 4.

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In view of the foregoing, it is concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate over the Union's request for official time to prepare for mid-term bargaining on proposals by the Respondent to change personnel policies, practices, and matters affecting employees' working conditions.

ORDER

Pursuant to section 7118 of the Statute and section 2423.29 of the Authority's Rules and Regulations, the Authority hereby orders that the Harry S. Truman Veterans Memorial Hospital, Columbia, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with American Federation of Government Employees, AFL-CIO, Local 3399, concerning official time to prepare for mid-term bargaining over proposed changes in personnel policies, practices, and matters affecting unit employees' working conditions initiated by the Respondent prior to June 9, 1980.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate with American Federation of Government Employees, AFL-CIO, Local 3399, concerning official time for union representatives to prepare for the negotiation of proposed changes in personnel policies, practices, and matters affecting unit employees' working conditions.

(b) Post at its facility at 800 Stadium Road, Columbia, Missouri, 65201, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, Harry S. Truman Veterans Memorial Hospital, Columbia, Missouri, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region VII, Federal Labor

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Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 4, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to negotiate with American Federation of Government Employees, AFL-CIO, Local 3399, concerning official time to prepare for mid-term bargaining over proposed changes in personnel policies, practices, and matters affecting unit employees' working conditions initiated prior to June 9, 1980.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, negotiate with the American Federation of Government Employees, AFL-CIO, Local 3399, concerning official time for union representatives to prepare for the negotiation of proposed changes in personnel policies, practices, and matters affecting unit employees' working conditions.

_____
(Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, the Federal Labor Relations Authority, whose address is: Federal Building & U.S. Customs House, 1531 Stout Street, Suite 301, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Activity

and

Case No. 0-AR-932

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Edwin R. Render filed by the Activity pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated January 22, 1985, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1/] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2/] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on February 25, 1985. However the exceptions were not filed until February 26, 1985. Therefore, the exceptions were untimely filed.

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

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In its exception, the Activity states that " . . . a copy of this award was served on the Social Security Administration on January 28, 1985." Inasmuch as the period for filing exceptions to the Arbitrator's award began on the date the award was served on the filing party, that is, deposited in the mail (see section 2429.27(d) of the Authority's Rules and Regulations), and not on the date the award was received by that party, the Activity's exceptions were untimely filed.

Accordingly, and apart from other considerations, the Activity's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 4, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 225, AFL-CIO

Union

and

Case No. O-NG-617

DEPARTMENT OF THE ARMY,
U.S. ARMY ARMAMENT RESEARCH
AND DEVELOPMENT COMMAND,
DOVER, NEW JERSEY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of four Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

3. The Employer will insure that any cost study reflects the most efficient in-house operation and is based on the same Scope of Work as the contract proposal.

Union Proposal 2

5. The Employer agrees to utilize a Wage Determination area which coincides with the Wage Grade Pay Survey area if wage grade employees are involved in the CITA study.

Union Proposal 1 is concerned with the comparative cost analysis which must be prepared by the Agency, in accordance with Office of

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Management and Budget (OMB) Circular (Revised) No. A-76, prior to deciding whether to perform an activity or function in-house or by contract. In particular, the proposal would require the Agency, when it calculates the costs of in-house operation, to consider such operations at their most efficient as well as to consider the same in-house scope of work as considered in the contract proposal. Union Proposal 2 would require the Agency, according to its uncontroverted statements in the record, "to use wage data from a specified wage determination area in its contracting out studies if those studies involve wage grade employees."1/ Thus, the proposals are to the same effect as Proposals 1 and 2 in American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 9 FLRA 733 (1982), reversed and remanded sub nom. AFGE Local 2736 v. FLRA, 715 F.2d 627 (D.C. Cir. 1983), decision and order on remand, 14 FLRA No. 55 (1984), which were found to be outside the duty to bargain because they directly interfered with management's right under section 7106(a)(2)(B) of the Statute "to make determinations with respect to contracting out."2/ In that case, the Authority found that Proposals 1 and 2 substantively restricted how a cost study used in determining whether to contract out could be conducted by prescribing standards to be used in evaluating some of the factors upon which a contracting out determination could be based. Therefore, for the reasons set forth in Wurtsmith Air Force Base, Union Proposals 1 and 2 herein, which prescribe standards management officials must use for evaluation when conducting cost studies, are outside the duty to bargain under section 7106(a)(2)(B) of the Statute.3/

1/ Agency Statement of Position at 4.

2/ Section 7106(a)(2)(B) provides in part:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> . . . . . .
>
> (2) in accordance with applicable laws--
>
> . . . . . .
>
> (B) . . . to make determinations with respect to contracting out . . . [.]

3/ Accordingly, it is unnecessary to address the Agency's additional contentions that Proposals 1 and 2 are not within its duty to bargain.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Proposals 1 and 2 be, and it hereby is, dismissed.

Union Proposal 3

> 4. The Employer agrees to abide by the procedural requirements of OMB Circular A-76 and further agrees that the cost comparison generated under the Circular fully reflects all Government and Contractor costs prior to deciding whether or not the contract cost is the lowest bid. Arbitrary guideline figures in the Circular (e.g., 4% for contract administration) will not be used but rather all elements of the cost comparison will be identified and the actual cost determined. In the case of Contract Administration costs, for example, the cost of Government Inspectors, Procurement support, etc. will be considered in arriving at the cost. Copies of the cost comparison and backup material will be provided to the Union.

Union Proposal 3 would require the Agency, among other things, to include all costs involved with contract and in-house performance when it prepares cost studies for comparison to determine which will provide lowest performance cost. With respect to some of the costs to be included, the proposal would prevent the Agency from using the arbitrary guideline figures provided in the Circular by requiring the Agency to include in the cost study only actual costs. According to the Agency, the proposal conflicts with the OMB Circular, which it alleges is a Government-wide rule or regulation, and thus is outside the duty to bargain under section 7117(a)(1) of the Statute.4/ As to this contention, OMB Circular No. A-76 (Revised), including the Supplement thereto, provides that agencies shall use standard cost factors, as prescribed in the Supplement, in the preparation of cost comparisons.5/

4/ Section 7117(a)(1) provides:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5/ See OMB Circular No. A-76 (Revised), paragraph 6f, and Part I, Chpt. 2, paragraph C of the Supplement (1983).

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Therefore, the proposal does conflict with the Circular and its Supplement and would be outside the duty to bargain if the Circular constitutes a "Government-wide rule or regulation" within the meaning of the Statute.

In this connection, the Circular and its Supplement apply to all executive agencies with some exceptions provided by law and thus are applicable to Federal employees within the executive branch of government.6/ Consequently, the Circular and its Supplement are generally applicable to the Federal civilian work force so as to be "Government-wide" within the meaning of section 7117(a)(1) of the Statute. See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980).

As to whether the provisions of the Circular and its Supplement constitute a "rule or regulation" within the meaning of section 7117(a)(1), the Authority has previously concluded that Congress intended that term to include "official declarations of policy of an agency which are binding on officials and agencies to which they apply."7/ In this regard, the purpose of the Circular is to establish Federal policy regarding the performance of commercial activities. (See paragraph 1. Purpose, of the Circular.) The Circular and Supplement were promulgated pursuant to The Budget and Accounting Act of 1921 (31 U.S.C. §§ 1 et seq.) and The Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. §§ 401 et seq.). (See paragraph 3. Authority, of the Circular.) The Circular and Supplement provide administrative direction to heads of executive agencies. (See paragraph 7. Scope, of the Circular.) The Circular seeks to ensure that its provisions and those of its Supplement are followed. (See paragraph 9. Action Requirements, of the Circular.) Therefore, it must be concluded that the Circular and its Supplement establish official policy which is binding on agencies and officials in the executive branch of the Federal government and thus constitute a "rule or regulation" within the meaning of section 7117(a)(1). Consequently, the proposal is inconsistent with provisions of a "Government-wide rule or regulation." Thus, even if, as the Union claims, the proposal involves procedures which management will observe in the exercise of its right to make determinations with respect to contracting out under section 7106(a)(2)(B), it is outside the duty to bargain as inconsistent with a Government-wide rule or regulation under section 7117(a)(1) of the Statute.8/

6/ See OMB Circular No. A-76 (Revised), paragraph 7. Scope.

7/ See National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colo., 9 FLRA 151 (1982), at 154-55.

8/ In so deciding, the Authority finds it unnecessary to consider the Agency's other contentions concerning the nonnegotiability of the proposal.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review of Union Proposal 3 be, and it hereby is, dismissed.9/

Union Proposal 4

> 6. Any disputes concerning whether the provisions of this Article have been complied with shall be submitted to the grievance/arbitration procedure. No contract shall be awarded until all grievances arising out of the contracting out decision have been resolved. In addition, no contract shall be awarded until any appeal of the Department of Labor Wage Determination, under the Federal Contract Services Act, is resolved.

Union Proposal 4 would include any dispute concerning compliance with provisions of "this Article," i.e., the collective bargaining agreement, within the scope and coverage of the negotiated grievance procedure. In this regard, the proposal was proffered in the context of negotiations in which the Union attempted to establish substantive contractual limitations on management's authority to contract out under section 7106(a)(2)(B) of the Statute, see Proposals 1 and 2 herein. The Agency in essence contends the proposal must be excluded from the scope and coverage of the negotiated grievance procedure because it is inconsistent with Federal law, i.e., section 7106(a)(2)(B) of the Statute. That is, according to the Agency, Union Proposal 4 is nonnegotiable under section 7106(a)(2)(B) because it would subject management determinations with respect to contracting out to challenge through the parties' negotiated grievance procedure. The Authority agrees with the Agency that, based on the language of the proposal and the record, and contrary to Union statements that the proposal is only procedural in nature, the proposal provides that the scope of the negotiated grievance procedure would cover grievances concerning management determinations with respect to contracting out including the decision to contract out itself. That is, by attempting to subject compliance with provisions of "this Article" to the negotiated grievance procedure in the context of these negotiations, the Union would have the management determinations themselves be subject to the negotiated grievance procedure.

9/ Cf. American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984)(a proposal that management would be required to exercise its right to make contracting out determinations in accordance with whatever applicable OMB directives, laws and regulations exist at the time of such action would be negotiable); American Federation of Government Employees, Local 225 and U.S. Army Armament, Research and Development

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In American Federation of Government Employees, AFL-CIO, Local 3403 and National Science Foundation, Washington, D.C., 6 FLRA 669 (1981), the Authority held a proposal providing for grievances challenging management determinations with respect to contracting out to be outside the duty to bargain under section 7106(a)(2)(B) of the Statute. In that case, the Authority cited to its decision in American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981), enforced sub nom. AFGE, Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 2085 (1983), that no grievance procedure could be negotiated which would deny the authority of an agency to exercise its management rights under section 7106.

Thus, since Union Proposal 4 herein would extend the coverage of the negotiated grievance procedure to the decision to contract out itself, it is for the reasons set forth in National Science Foundation and Saint Lawrence Seaway Development Corporation inconsistent with section 7106(a)(2)(B) of the Statute. Therefore, this proposal is distinguishable from Proposal 1 which was held negotiable in American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984). That proposal required management to exercise its right to make contracting out determinations in accordance with whatever applicable laws and regulations existed at the time of such action. Hence, the Authority found the proposal contractually recognized external limitations on management's right but did not establish, either expressly or by incorporation, any particular substantive limitations on management and, thus, the Authority decided the proposal was not inconsistent with management's right "to make determinations with respect to contracting out" under section 7106(a)(2)(B) of the Statute. In essence, Union Proposal 4, as mentioned above, requires that contracting-out decisions be made in accordance with provisions of the parties' collective bargaining agreement and the Union is seeking to include provisions in the parties' agreement which would establish substantive limitations on management's authority in this regard. Thus, since the proposal, rather than being only procedural in nature as was the proposal in Equal Employment Opportunity Commission, would create substantive limitations on management's authority to contract out, it must be found to be outside the duty to bargain.10/

(Continued)

Command, Dover, New Jersey, 11 FLRA No. 108 (1983) (in the absence of a union request in the record for the Authority to fragment the proposal for separate consideration of the different matters included therein, the Authority will consider the proposal as a whole and make a single negotiability determination with respect thereto).

10/ In so deciding, the Authority finds it unnecessary to consider the Agency's other contentions concerning the nonnegotiability of the proposal.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review of Union Proposal 4 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 5, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U. S. ARMY CORPS OF ENGINEERS

Activity

and

Case No. 0-AR-637

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 639

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Daniel E. Matthews filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Activity filed an opposition.1/

The dispute before the Authority in this matter concerns the Arbitrator's denial of the Union's request for attorney fees under the Equal Access to Justice Act [EAJA], 5 U.S.C. § 504. In his award on the merits, the Arbitrator found that the Activity properly charged the grievant with three hours of AWOL but that it did not have just cause to also issue a written reprimand. The Arbitrator therefore denied the grievance in part and granted it in part. The Union subsequently filed a motion with the Arbitrator requesting an award of attorney fees under the EAJA. The Arbitrator found that neither the disciplinary action procedures followed by the Activity nor the arbitration proceeding constituted an "adversary adjudication" within the meaning of the EAJA and also that he was not an "adjudicative officer of the agency" under the Act. Accordingly, the Arbitrator denied the Union's motion.

1/ The Activity contends, among other things, that the Union's exception was not timely filed. However, the Authority has determined that the time limits for filing the Union's instant exception commenced with the Arbitrator's denial of the Union's motion for attorney fees under the Equal Access to Justice Act, which denial was served on the parties after his award on the merits in this matter, and therefore that the Union's exception was timely filed. E.g., United States Department of the Interior, Bureau of Land Management, Eugene District Office and National Federation of Federal Employees, Local 1911, 6 FLRA 401, 403 n. 2 (1981).

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In its exception, the Union contends that the Arbitrator's denial of its motion is contrary to the EAJA primarily because the arbitration proceeding was an "adversary adjudication" under the EAJA.

Section 504(a)(1) of the EAJA provides:2/

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

"Adversary adjudication" is defined in section 504(b)(1)(C) as "an adjudication under section 554 of [the Administrative Procedure Act]... in which the position of the United States is represented by counsel or otherwise." An adjudication under section 554 is one "required by statute to be determined on the record after opportunity for an agency hearing," unless the proceeding falls within one of six exceptions, none of which apply to this case. 5 U.S.C. § 554(a).

Grievance procedures under the Federal Service Labor-Management Relations Statute are not subject to the procedural requirements of the Administrative Procedure Act. Rather, the procedures are determined by the parties in their collective bargaining agreements and by arbitrators, and the procedures vary from agreement to agreement and arbitrator to arbitrator.3/ Therefore, the Arbitrator in this case correctly determined that the proceeding before him was not an "adversary adjudication" for purposes of the EAJA and on that basis alone attorney

---

2/ As to the current status of 5 U.S.C. § 504(a)(1), the Authority notes that section 203(c) of the EAJA (Pub. L. No. 96-481, § 203(c); 94 Stat. 2325, 2327 (1980)) provides:

> Effective October 1, 1984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsection (a) of this section, are repealed, except that the provisions of such section shall continue to apply through final disposition of any adversary adjudication as defined in subsection (b)(1)(C) of such section, initiated before the date of repeal.

3/ See F. Elkouri & E. Elkouri, How Arbitration Works 181-83 (3d ed. 1973).

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fees under the EAJA were not warranted in connection with such proceeding.4/ Consequently, the Union has failed to establish that the Arbitrator's denial of its motion is contrary to law as alleged.

Accordingly, the Union's exception is denied.

Issued, Washington, D.C., April 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ In denying on this basis the Union's exception to the Arbitrator's decision denying attorney fees, the Authority finds it unnecessary to pass on the other arguments raised in the Activity's opposition to the Union's exception.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1

Union

and

Case No. O-NG-901

ENVIRONMENTAL PROTECTION AGENCY
AND ENVIRONMENTAL PROTECTION
AGENCY REGION 9

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises an issue concerning the negotiability of the following Union proposal.*/ Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal

> When the supervisor determines that a work assignment is of such importance that the employee's leave which was properly and timely scheduled in writing, must be cancelled, and the cancellation will result in the leave being forfeited because it cannot be rescheduled prior to the end of the leave year, the supervisor must then obtain approval of the exigency of the work from the Regional Administrator prior to the cancellation of the employee's leave. [Only the underscored portion is in dispute.]

*/ In its Statement of Position, the Agency withdrew its disapproval of an additional proposal concerning temporary promotions which the Union had originally included in its appeal. Consequently, there is no longer an issue as to whether that proposal is within the duty to bargain.

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This proposal, by requiring the Regional Administrator to make an "exigency of work" determination prior to the cancellation of approved employee leave, prescribes a specific duty which a particular non-bargaining unit employee would perform. In this regard, the proposal is to the same effect as the Union's proposal in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 14 FLRA 278 (1984), appeal docketed sub nom. Local 32, AFGE v. FLRA, No. 84-1251 (D.C. Cir. June 15, 1984), which also prescribed a specific duty which a particular non-bargaining unit employee would perform. In that case, the Authority found the proposal to be outside the duty to bargain since it would directly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute by eliminating the discretion inherent in that right. Contrary to the Union's argument, the instant proposal would absolutely prohibit the Agency from assigning the duty of making "exigency of work" determinations prior to the cancellation of approved employee leave to any person other than the specified management official, thereby eliminating the discretion inherent in management's right to assign work. Therefore, based on Office of Personnel Management and the case cited therein, the instant proposal is likewise outside the duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1622

Union

and

Case No. O-NG-853

THE DIRECTORATE FACILITIES AND
ENGINEERING DEPARTMENT OF THE ARMY,
FORT GEORGE G. MEADE, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of one Union proposal. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal

> In the Cost Comparison Analysis of the Commercial Cost Study of any bargaining unit activity, the "fringe benefit" factors must be demonstrated to be fair and reasonable and will be derived from the Employer's actual local fringe benefit factors existing at the time of the cost study.

This proposal conflicts with the Agency's right to "make determinations with respect to contracting out" pursuant to section 7106(a)(2)(B) of the Statute. In this regard, the Authority has previously determined that the right of management officials to make determinations with respect to contracting out encompasses not only the right to take such action but also the right to engage in preliminary discussion and deliberation concerning the relevant factors upon which such determinations will be made. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981) (Union Proposal 1), affirmed sub nom. National Federation of Federal Employees, Local 1167 v. Federal

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Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982). Thus, the Authority has found proposals which prescribe standards to be utilized by management to evaluate the factors upon which a decision to contract out could be based to be nonnegotiable because they interfere with the agency's deliberative process. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984) (Proposals 1 and 2). Therefore, based on the reasons stated in Wurtsmith Air Force Base and Homestead Air Force Base, the disputed proposal herein, which specifically prescribes the standards to be used to calculate fringe benefit factors for the cost comparison analysis, i.e., some of the factors upon which a decision to contract out could be based, is not within the duty to bargain.

In addition, contrary to the Union's contentions, the proposal is inconsistent with OMB Circular No. A-76 (hereinafter "the Circular"). Specifically, the proposal conflicts with Part 4, Chapter 2(D)(3)(g), of the 1983 Supplement of the Circular (hereinafter "the Supplement") which mandates that when making a cost comparison between in-house and potential contract performance an agency must use various formulas, called standard factors, which calculate the cost of various fringe benefits as a percentage of wages.1/ For certain of these benefits,

1/ Part 4, Chapter 2(D)(3)(g) of the Supplement provides in relevant part:

> g. Fringe Benefits or FICA - (Column G).
>
> (1) Multiply the following Government-wide standard factors by the appropriate basic pay (column F).
>
> (a) The Government cost factor to be used for Federal employee retirement benefits, based on a dynamic normal cost projection for the Civil Service Retirement Fund, is 20.4 percent.
>
> (b) The Government cost factor to be used for Federal employee insurance (life and health) benefits, based on actual cost, is 3.7 percent, plus an additional 1.3 percent for Medicare up to annual salary limitations placed on employees covered under FICA.
>
> (c) The Government cost factor to be used for Federal employee workmen's compensation, bonuses and awards and unemployment programs is 1.9 percent.
>
> (2) The Federal Insurance Contributions Act (FICA) cost factor will be applied to applicable employees (normally intermittent employees). Be careful to apply the FICA rate only to wages and salaries subject to the tax; there is an annual salary limitation for FICA tax and new Federal employees will be affected by FICA taxes.

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i.e., Medicare and FICA, the percentage formula represents the actual cost to the agency of providing the benefits. For others, most notably retirement contributions, the standards factors are only an estimate, based on Government-wide figures, of the cost of providing the benefit. The Union's proposal, however, would require the Agency to use actual costs in all cases to calculate fringe benefits rather than the standard factors mandated by the Circular.

Since the proposal is inconsistent with the Circular and its Supplement, it would be outside the duty to bargain if the Circular constitutes a "Government-wide rule or regulation" within the meaning of section 7117(a)(1) of the Statute. In this connection, the Circular and its Supplement apply to all executive agencies with only limited exceptions as set forth in the Circular and not here relevant.2/ Consequently, the Circular and its Supplement are generally applicable to the Federal civilian work force so as to be "Government-wide" within the meaning of section 7117(a)(1) of the Statute. See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980).

As to whether the provisions of the Circular and its Supplement constitute a "rule or regulation" within the meaning of section 7117(a)(1), the Authority has previously concluded that Congress intended that term to include "official declarations of policy of an agency which are binding on officials and agencies to which they apply." See National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado, 9 FLRA 151 (1982), at 154-55.

The Circular and Supplement were promulgated pursuant to The Budget and Accounting Act of 1921, 31 U.S.C. § 1 et seq. and the Office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. §§ 401 et seq. Paragraph 1 of the Circular states that its purpose is to establish "Federal Policy regarding the performance of commercial activities." Paragraph 7 of the Circular indicates that the Circular and Supplement are to "provide administrative direction to heads of executive agencies." Paragraph 9 of the Circular sets forth procedures to be followed to ensure that the provisions of the Circular and the Supplement are followed.

Therefore, it must be concluded that the Circular and its Supplement establish official policy which is binding on agencies and officials in the executive branch of the Federal government and thus constitute a "rule or regulation" within the meaning of section 7117(a)(1). Consequently, since the proposal is inconsistent with provisions of a "Government-wide rule or regulation," it is outside the duty to bargain under section 7117(a)(1) of the Statute.

2/ See Paragraph 7 of the Circular. Scope.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FORT KNOX TEACHERS ASSOCIATION

Union

and

Case No. 0-NG-919

FORT KNOX DEPENDENTS SCHOOLS

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition for review of a negotiability issue filed by the Union. For the reasons stated below, the Union's petition must be dismissed.

The record before the Authority in this case indicates that the negotiability dispute arose when the Activity denied a Union grievance concerning homeroom assignments on the ground that such assignments were nonnegotiable management rights and therefore not grievable or arbitrable under the parties' negotiated agreement. In response to the Activity's denial of the grievance, the Union filed the instant negotiability appeal.

Under section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, a union properly may file a negotiability appeal where the union and an agency are involved in collective bargaining and the agency alleges that the duty to bargain does not extend to any matter proposed to be bargained.

In this case, as indicated above, the dispute arose in the context of a grievance proceeding and not in the course of collective bargaining between the parties. Such disputes are properly resolved under the grievance procedures provided by the parties in a collective bargaining agreement. See, e.g., Louis A. Johnson Veterans Administration Medical Center, Clarksburg, West Virginia and American Federation of Government Employees, Local 2384, 15 FLRA No. 74 (1984). Consequently, the Union's petition does not meet the conditions for review of a negotiability issue under the Statute and the Authority's Rules and Regulations.

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Accordingly, and apart from other considerations, the Union's petition for review is hereby dismissed.
For the Authority

Issued, Washington, D.C., April 10, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND AND WILKES-BARRE
DATA OPERATIONS CENTER

Respondent

and

Case Nos. 2-CA-20200
2-CA-20346

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent has not engaged in the unfair labor practices alleged in the consolidated complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the exceptions.1/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings and conclusions, based upon his credibility determinations, that the Respondent did not discriminate against Robert Kopko

1/ The General Counsel excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

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either by failing to rehire him as a temporary mail and file clerk on the day shift or by subsequently terminating his temporary employment as a mail and file clerk on the night shift, as alleged in the complaint.2/ Accordingly, the complaint shall be dismssed.

ORDER

IT IS ORDERED that the consolidated complaint in Case Nos. 2-CA-20200 and 2-CA-20346 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In adopting the Judge's conclusion that the preponderance of the evidence fails to establish that the Respondent discriminated against Kopko in violation of the Statute, the Authority finds it unnecessary to pass upon whether Kopko was an "employee" within the meaning of section 7103(a)(2) of the Statute in the facts and circumstances of this case for purposes of the alleged section 7116(a)(1) and (4) violation.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND AND WILKES-BARRE DATA OPERATIONS CENTER Respondent	
and	Case Nos. 2-CA-20200 2-CA-20346
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

Irving L. Becker, Esquire
For the Respondent

Lee Mingledorff, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns a consolidated unfair labor practice complaint issued by the Regional Director, Region II, Federal Labor Relations Authority, New York, New York, against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Wilkes-Barre Data Operations Center (Respondent) based on charges filed by the American Federation of Government Employees (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1), (2), and (4) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by (a) on or about January 11, 1982, failing to select Robert Kopko for a mail and file clerk position on the day shift, (b) on or about January 18, 1982, by selecting Robert Kopko for a mail and file clerk position on the night shift, and (c) on or about April 2, 1982, by terminating the employment of Robert Kopko as a mail and file clerk on the night shift. The

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complaint alleges that these actions were taken by Respondent because of Kopko's membership and activities in behalf of the Union and/or because he provided information or testimony under the Statute. Respondent's answer admitted the jurisdictional allegations relating to the Respondent, Charging Party, and the filing of the charges, but denied any violation of the Statute.

A hearing was held in Wilkes-Barre, Pennsylvania. The Respondent and the General Counsel, FLRA were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed helpful briefs, and the proposed findings have been adopted in whole or in substance where found supported by the record as a whole.

Issues Presented

1. Was Mr. Kopko at the time he applied for employment with Respondent, on or about January 11, 1982, an "employee" within the meaning of Section 7103(a)(2) of the Statute so that Respondent's decision not to reemploy him could form the basis of an unfair labor practice under Section 7116(a)(1), (2), and (4) of the Statute.

2. Is the complaint in Case No. 2-CA-20200 barred by Section 7116(d) based on Kopko's discrimination complaint or on other appeals available to him as an applicant for employment.

3. Did Respondent fail to select Kopko for a day shift mail and file clerk position on January 11, 1983 because he engaged in protected activity under the Statute.

4. Was Kopko's termination as a mail and file clerk on the night shift, on or about April 2, 1982, an unlawful result of Respondent's discriminatorily failing and refusing to employ him on the day shift on January 11, 1983.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

I. Findings of Fact

Robert Kopko began his employment with the Wilkes-Barre Data Operations Center as a temporary clerk on February 12, 1979. Because of lack of work, his employment was terminated on September 28, 1979. On October 29, 1979, he was again employed as a temporary employee for one year. This appointment was extended for an additional year until October 28, 1981, when his employment term expired. During his employment, from February 1979 through October 1981, Kopko worked on the day shift (7:30

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a.m. to 4:00 p.m.) as an entry level GS-3 shipping/receiving clerk or mail and file clerk.

Kopko was an above average employee during his first and part of his second appointment and received recognition for his work. In June 1980, he received a letter from the Center Director for exceeding performance requirements during the period December 1979 to May 1980 and was given a special achievement award of $75.00. He received two employee suggestion awards of $25.00 and $50.00 in January of 1981.

Kopko's attitude towards his job began to change in April of 1981. He became insubordinate to a number of supervisors. He refused to initially perform certain assignments, remarking that he was only a temporary GS-3, or making other inappropriate comments. He was orally counseled by his supervisor on two occasions. In April 1981, he was insubordinate to Rita Stephanski, a supervisor. On this occasion, his supervisor received a written complaint from Stephanski and counseled Kopko in writing. She also brought the matter to the attention of her supervisors, including Robert Dominick, support services supervisor.

Kopko filed a grievance concerning the written counseling. Another incident occurred regarding the use of a tape recorder to record the first step grievance meeting between Kopko, his representative, and Stephanski. Kopko indicated to Stephanski that higher management had approved the use of the tape recorder at the first step meeting. However, this was not the case. Management called a special meeting with the Union to discuss the matter of the unauthorized taping.

In late 1980 and early 1981, Kopko gave information to two Authority agents who were investigating unfair labor practice charges. Kopko furnished his supervisor with the original copy of an incompleted affidavit in Case 2-CA-786 after speaking with the Authority agent.

In May 1981, sometime after the Stephanski insubordination incident, Kopko became the only Union steward for the Administrative Services Division. As a steward, Kopko helped write up some grievances. He did not make oral presentations of the grievances. He also worked with the Union on some bargaining proposals. Kopko brought evidence to the Union that led to the filing of an unfair labor practice charge against the head of the Administrative Services Division, Daniel Dervin, concerning alleged alteration and circulation of an unfair labor practice charge. The charge was dismissed, but Dervin appeared less friendly to Kopko thereafter.[1/] Kopko also filed safety and health complaints, some against his immediate supervisor.

1/ During the period between February 10, 1981 and August 26, 1981, the Union filed an average of one charge a month against the Administrative Services Division.

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Management was aware of Kopko's Union activities. Kopko received whatever official time he needed to carry out his representational activities and was never criticized for his use of official time.

After the expiration of his term of employment on October 28, 1981, Kopko again applied for employment as a temporary dayshift clerk to begin January 6, 1982. He was not selected for this position. Robert Dominick, support services supervisor, whose testimony I credit, was the selecting officer for the temporary employees who were hired at that time. Dominick took into consideration the incidents of insubordination relating to Kopko and felt that he was not among the best qualified employees due to the need for employees in the support services division to have daily interaction with other supervisors. He also considered the fact that Kopko had lied about being given permission by management to tape record a grievance meeting.

All temporary employee appointments depend on there being available work to perform, and no one can definitely state how long an appointment will last. However, mail clerks hired for the day shift generally are employed for a longer period of time than mail clerks employed for the night shift.

Fifteen mail clerks were hired for the day shift and four for the night shift effective January 11, 1982. Six of them had worked previously for the Wilkes-Barre facility, but only two had worked as mail and file clerks. None of the six had been a Union member or active in the Union.

After being advised that he was not selected for the day shift position, Kopko filed an EEO complaint alleging that he was not rehired due to a speech impediment.[2/] On January 11, 1982, Kopko's EEO complaint was investigated by an EEO counselor, Edward Cooper. Cooper interviewed all management officials who regularly had contact with Kopko during his previous employment. One of the persons interviewed was Robert Dominick, the selecting official for mail clerks in January. Cooper asked Dominick what criteria were used in selecting a mail and file clerk and why Kopko had not been selected. Mr. Dominick stated that there were no criteria for the selection other than giving some other people a chance at the job. Dominick did not state that he was in any way dissatisfied with Kopko's prior performance as a mail and file clerk. Mr. Cooper also interviewed Daniel Dervin who stated that the only criterion used in selecting mail and file clerks was the desire for some new faces. Finally, Mr. Cooper interviewed Ms. McCarthy and

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[2/] Kopko apparently had the speech impediment in 1979, but did not disclose any speech impairment on his 1979 application. Prior to being shown his 1979 application, Kopko testified that he did tell the agency about the handicap.

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Ms. Rosalie Klosko, former immediate supervisors of Kopko. Neither supervisor related any negative remarks concerning Kopko's desirability as an employee. Ms. McCarthy stated that Kopko was a good worker.

On January 14, 1983, Robert Dominick selected Kopko as a mail clerk for the night shift. One of the night shift clerks hired on January 6, 1983 did not report, and Dominick considered Kopko to be the next best qualified. Kopko accepted this position and was rehired effective January 18, 1982. The night shift hours were from 4:30 p.m. to 1:00 a.m.

On April 2, 1982, Kopko and four other temporary mail and file clerks assigned to the night shift were terminated because of lack of work. Mail clerks on the day shift were not furloughed until the fall of 1982.

Subsequent to his employment with the Respondent, Kopko has worked for the Veterans Administration. He has had some periods of unemployment.

II. Discussion, Conclusions and Recommendations

A. Kopko was an "employee" within the meaning of section 7103(a)(2).

Respondent contends that the allegation that Respondent violated sections 7116(a)(1), (2), and (4) of the Statute by failing to select Kopko for a position on or about January 11, 1982 (Case No. 20200) should be dismissed inasmuch as Kopko was only an applicant for employment and not an "employee" within the meaning of section 7103(a)(2) of the Statute when the alleged violations took place.

Section 7103(a)(2) of the Statute provides:

> (2) 'employee' means an individual --
> (A) employed in an agency; or
> (B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority; . . .

Section 7116(a)(1), (2) and (4) of the Statute provides:

(a) For the purpose of this Chapter, it shall be an unfair labor practice for an agency --
(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

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. . .

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter; . . ."

Section 7116(a)(2) does not use the term "employee." Giving the common meaning of "hire" or "hiring,"[3/] I agree with the position of the General Counsel that "discrimination in connection with hiring" in section 7116(a)(2) includes a discriminatory refusal to hire or rehire an applicant for employment. In Executive Order 11491, the precursor to the Statute, section 19(a)(2) of Executive Order No. 11491 was substantially the same as section 7116(a)(2) and was also held to be applicable to alleged discriminatory failure to rehire. Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR No. 618, 6 A/SLMR 112 (1976).

Given the purpose of Congress to protect employees in the exercise of their rights to "form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal,"[4/] a former employee must be held to be an "employee" within the meaning of section 7103(a)(2) of the Statute for the purpose of section 7116(a)(1) and (4) of the Statute. The words "otherwise discriminate" in section 7116(a)(4) also must be found to include discrimination in regard to the rehiring of an employee.

Respondent's position, that a temporary employee loses all statutory protection against retaliation for his union activity when his temporary employment ends, would seriously undercut the purpose of the Statute to encourage the employee exercise of statutory rights by protecting persons from retaliation. No temporary employee, especially one in a position such as mail and file clerk where furloughs and rehirings are common, would feel free to join or participate in a labor organization with such an interpretation of the law. In my view, the Statute should be broadly interpreted to further the Congressional objective, as has been the case with the comparable provisions of the Labor Management Relations Act, 29 U.S.C. § 158(a)(1) and (4) in the private sector. See, e.g., NLRB v. Sovair Manufacturing Co., 104 LRRM 2760 (6th Cir., 1979); NLRB v. Brake

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[3/] The Random House College Directory defines "hire, hired, hiring":

1. to engage the services of for wages or other payment.
2. to engage the temporary use of at a set price.
3. to grant the temporary use of, or the services of, for a compensation . . . .
4. to pay for the desired action or conduct of . . . .

[4/] See sections 7101 and 7102 of the Statute.

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Parts Co., 447 F. 2d 503, 514 (7th Cir., 1971); Dubin-Haskell Lining Corp. v. NLRB, 386 F. 2d 306 (4th Cir., 1967).

B. Case No. 2-CA-20200 need not be dismissed pursuant to Section 7116(d).

Respondent urges that the complaint in Case No. 2-CA-20200 should be dismissed pursuant to section 7116(d) of the Statute.[5/] Respondent points out that Kopko filed a complaint of discrimination on the grounds that he was not reemployed because of his physical handicap. Respondent also asserts that Kopko, as an applicant for employment, had the right to appeal to the Merit Systems Protection Board pursuant to 5 U.S.C. § 7701(a) and 5 U.S.C. § 7702(a)(1).

No showing has been made that the issues involved in the instant complaint "can properly be raised" under the appeals procedures cited by Respondent. The issue in Mr. Kopko's equal employment opportunity complaint will necessarily be limited to the handicap discrimination issue raised by Mr. Kopko. Cf. Department of Agriculture, U.S. Forest Service, Siuslaw National Forest, Corvallis, Oregon, 3 FLRA No. 42 (1980); Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, 2 FLRA No. 12 (1979). It appears that 5 U.S.C. § 7701(a) and § 7702(a)(1) gives applicants only limited rights of appeal to the Merit Systems Protection Board concerning non-selection based on discrimination prohibited by the Civil Rights Act of 1964, the Fair Labor Standards Act of 1938, the Rehabilitation Act of 1973, or the Age Discrimination in Employment Act of 1973. Thus, Respondent has failed to support its affirmative defense that section 7116(d) operates to bar the complaint in Case No. 2-CA-20200.

C. A preponderance of the evidence does not establish the alleged violations of the Statute.

The General Counsel contends that Respondent failed to select Mr. Kopko for the day shift mail and file clerk position on January 11, 1983 because he engaged in protected activity under the Statute. The General Counsel also claims that Kopko's termination as a mail and file clerk on the night shift on April 2, 1982 was an unlawful result of Respondent's discriminatory refusal to reemploy him on the day shift on Januay 11, 1983.

5/ Section 7116(d) provides:

"(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. . . ."

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In order to establish a violation of sections 7116(a)(2) and (4) there must be a showing that the alleged discriminatee was engaged in protected activity, that the Respondent had knowledge of such activity, and that the Respondent took action against the discriminatee because of its anti-union animus. Veterans Administration Medical Center, Buffalo, New York, 13 FLRA No. 46 (1983); Department of Transportation, Federal Aviation Administration, Boston Air Route Traffic Control Center, Nashua New Hampshire, 11 FLRA No. 67 (1983). Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

The record establishes that Kopko was engaged in protected activity, and that Respondent had knowledge of such activity. The General Counsel urges that circumstantial evidence establishes the element of discriminatory motivation. The General Cousel points out that the reason for non-selection given at the hearing that Kopko was in some respects an undesirable employee, was pretextual and conflicted with the rationale given to the EEO counselor in January (the desire for new people or new faces in the job); six of the clerks hired were former employees, but non-union members; and that Kopko was an experienced and qualified employee. The General Counsel contends that Respondent took the action because of Kopko's protected activities. The General Counsel suggests that Respondent's management officials were displeased with the Union for having filed numerous unfair labor practice charges against their section. He claims they were displeased with Kopko in particular for having filed safety and health complaints against a supervisor, for using official time, and for taking an altered charge form to the Union which led to the filing of an additional charge against the head of the section.

While the trier of fact may infer motive from the total circumstances proved, the trier of fact is not compelled to draw such a conclusion. Veterans Administration, supra. In this case, I decline to draw such an inference. I have credited the testimony of Respondent's witnesses, particularly the selecting official, Robert Dominick, as to his reason for making the selection, namely that Kopko was not among the best qualified employees due to previous incidents of insubordination, and the testimony of supervisors Stephanski, Klosko, and Pissott as to these incidents. I do not find the reason for the nonselection which was given to the EEO counselor in January to be so inconsistent (the desire for new people) with the reasons given at the hearing as to suggest another reason entirely. The expressed desire for "new faces" meant that they did not want Kopko. The record demonstrates that the reason they did not want Kopko on the day shift was dissatisfaction with his work performance and not his Union activities. The record also shows that Kopko was subsequently properly selected for the night shift and was later terminated along with other night shift mail and file clerks because of lack of work.

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It is concluded that a preponderance of the evidence does not establish that Respondent violated sections 7116(a)(1), (2) and (4), as alleged. Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following order:

Order

It is hereby Ordered that the Consolidated Complaint in Case Numbers 2-CA-20200 and 2-CA-20346 be, and it hereby is, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: February 17, 1984
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and

Case No. 3-CO-20003

SOCIAL SECURITY ADMINISTRATION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Charging Party and the General Counsel filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendation, only to the extent consistent herewith.

The Judge concluded that the Respondent, American Federation of Government Employees, AFL-CIO (AFGE), did not violate section 7116(b)(1) and (8) of the Statute[1/] by charging non-member employees disparate

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1/ Section 7116(b) provides in pertinent part:

§ 7116. Unfair labor practices

. . . . . .

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(Continued)

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fees to participate in a class action law suit under the Back Pay Act. In reaching this conclusion, the Judge found that section 7114(a)(1) of the Statute[2/] obliges an exclusive representative to adhere to a standard of fair representation only in those proceedings which are in the sole control of the exclusive representative by virtue of its certification, but does not impose such obligations in those proceedings which are available to employees in general, and are supplementary to, but not a substitute for, proceedings which are the sole prerogative of the exclusive representative. The Authority does not agree.

The duty of fair representation is not restricted to those proceedings under the sole control of the exclusive representative as a consequence of its certification. Rather, when an exclusive representative decides to represent unit employees in any matter which affects their conditions of employment, it has the duty under section 7114 of the Statute to represent unit employees fairly, and may not discriminate with regard to that representation on the basis of union membership. National Treasury Employees Union and National Treasury Employees Union Chapter, 121, 16 FLRA No. 102 (1984), petition for review filed sub nom. National Treasury Employees Union v. FLRA, No. 85-1053 (D.C. Cir., Jan. 25, 1985); National Treasury Employees Union, 10 FLRA 519 (1982), aff'd, 721 F.2d 1402 (D.C. Cir. 1983) (encompassed within the union's duty under section 7114(a)(1) is the furnishing of the services of an attorney on a non-discriminatory basis in removal actions, both within the Agency procedures as well as before the Merit Systems Protection Board). Within

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(Continued)

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

2/ Section 7114(a)(1) provides:

> § 7114. Representation rights and duties
>
> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

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that duty is the obligation not to discriminate on the basis of union membership concerning the fees to be charged for the attorney's services in representing unit employees on matters affecting their conditions of employment.3/

Accordingly, in the instant case, the Authority finds that Respondent AFGE, by discriminating between members and nonmembers in assessing attorneys' fees for unit employees participating in a class action law suit seeking to recover overtime pay, failed to meet its obligations under section 7114(a)(1) of the Statute and thereby violated section 7116(b)(1) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the American Federation of Government Employees, AFL-CIO shall:

1. Cease and desist from:

(a) Assessing disparate contingency fees for attorney representation in a class action law suit involving entitlement to overtime pay based upon membership or nonmembership in the American Federation of Government Employees, AFL-CIO.

(b) Interfering with, restraining, or coercing unit employees in the exercise of their right to refrain from joining, freely and without fear of penalty or reprisal, the American Federation of Government Employees, AFL-CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Represent all employees in units of exclusive recognition without discrimination and without regard to membership in the American Federation of Government Employees, AFL-CIO.

3/ Compare, American Federation of Government Employees, Local 1778, AFL-CIO, 10 FLRA 346, 349 (1982) (wherein the Authority dismissed several alleged violations of section 7116(b)(8) of the Statute, finding that the General Counsel had failed to meet the burden of proving that the union had discriminated against nonmember unit employees with workmen's compensation claims since unrebutted testimony indicated that all employees with such claims were required to pay their own attorneys' fees when claims were appealed beyond the Activity's jurisdiction).

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(b) Rescind the conditional contingency fee arrangement imposed upon employees seeking to join the class action law suit prosecuted by Attorney Banov concerning the appropriate calculation of overtime pay for employees in the unit exclusively represented by the American Federation of Government Employees, AFL-CIO, and make whole any employee in the bargaining unit for any loss of money suffered as a consequence of the conditional contingency fee arrangement.

(c) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Social Security Administration are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the President of the American Federation of Government Employees, AFL-CIO, or his designee, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and to other employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Submit appropriate signed copies of such Notices to the Administrator of the Social Security Administration, Baltimore, Maryland, for posting in conspicuous places where the unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT assess disparate contingency fees for attorney representation in a class action law suit involving entitlement to overtime pay based upon membership or nonmembership in the American Federation of Government Employees, AFL-CIO.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their right to refrain from joining, freely and without fear of penalty or reprisal, the American Federation of Government Employees, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL represent all employees in units of exclusive recognition without discrimination and without regard to membership in the American Federation of Government Employees, AFL-CIO.

WE WILL rescind the conditional contingency fee arrangement imposed upon employees seeking to join the class action law suit prosecuted by Attorney Banov concerning the appropriate calculation of overtime pay for employees in the unit we exclusively represent, and make whole any employee in the bargaining unit for any loss of money suffered as a consequence of the conditional contingency fee arrangement.

_____

(Union)

Dated:_____ By:_____

(Signature) (Title)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1118 18th Street, NW., Suite 700, Washington, D.C. 20033-0758, and whose telephone number is (202) 653-8456.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Respondent and SOCIAL SECURITY ADMINISTRATION Charging Party	Case No. 3-CO-20003

Mark D. Roth, Esquire
For the Respondent

Sharon Prost, Esquire
For the General Counsel

Irving L. Becker, Esquire
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq., and the Rules and Regulations issued thereunder, Fed. Reg. Vol. 45, No. 12, January 17, 1980 and Vol. 46, No. 154, August 11, 1981, 5 C.F.R. Chapter XIV, Part 2411, et seq.

Pursuant to a charge filed on December 1, 1981, by the Social Security Administration (hereinafter called the SSA or Charging Party), a Complaint and Notice of Hearing was issued on March 22, 1982, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the American Federation of

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Government Employees, AFL-CIO (hereinafter called the AFGE, or Union or Respondent), violated Sections 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute or Act), by virtue of its actions in failing to accord equal representation in a class action law suit to unit employees who are not members of the Union.1/

A hearing was held in the captioned matter on May 12, 1982, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the Charging Party submitted post-hearing briefs on June 25 and June 23, 1982, respectively, which have been duly considered along with the General Counsel's closing argument made on the record.2/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Since 1979, the Union has been the exclusive bargaining representative in a consolidated unit of SSA employees. Prior to that time the Union had been the exclusive bargaining agent of various separate groups of SSA employees located throughout the United States. Local 1923 of the Union services the unit employees working at the SSA Baltimore, Maryland headquarters.

In 1978, a question arose with respect to whether or not the SSA was paying the proper night differential to Baltimore, Maryland, unit employees working overtime in the electronic data processing area.3/

1/ Specifically, the complaint is grounded on the alleged action of the Union in retaining an attorney to file a class action suit and allowing the attorney to charge unit employees different contingent fees based solely upon whether they were members or non-members of the Union.

2/ In the absence of any objection, the Union's Motion of May 26, 1982, to make three corrections in the transcript, should be, and hereby is, granted.

3/ The SSA was then paying employees who worked overtime 10% night differential pay based on the regular hourly rate rather than on the time and one-half overtime rate.

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Upon discovering the alleged underpayment, many of the unit employees filed grievances, both individually and through the Union, under the grievance procedure of the collective bargaining contract then in effect. At the time of the hearing the grievances had not as yet been finally resolved or processed to arbitration.4/

Beginning in the spring of 1978, Union and Management representatives held numerous meetings wherein the mechanics for processing the grievances and/or back pay claims of the affected employees were discussed. Additionally, as a result of the meetings and discussions a ruling on the matter was sought from the Comptroller General and subsequently a task force was established for purposes of processing both the background records and back pay claims of the numerous employees involved.

Not being satisfied with the progress of the SSA task force in settling the employees' night pay differential grievances and/or claims, Mr. Harold Roof, President of Local 1923, who had been representing the employees in the discussions of their pending night pay differential grievances, contacted Mr. Alan Banov, a private attorney in the latter part of 1980, concerning the possibility of filing a civil action in U.S. District Court for purposes of obtaining the back pay underlying the pending grievances.5/

Although not entirely clear from the record, it appears that Mr. Banov and Mr. Roof subsequently reached an agreement whereby Mr. Banov would represent the SSA unit employees in a class action suit against SSA for the night pay differential allegedly due them. According to the testimony of Mr. Banov, it was his original intention to recoup his expenses and fee for the law suit solely from the Government. Furthermore, according to the testimony of Mr. Banov, prior to November 1981, when a "consent form" was published in the "Government Standard" an official AFGE publication,6/ he had been circulating a variety of consent

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4/ The collective bargaining agreement provides that arbitration, the final step in the grievance procedure, "may only be invoked by the Union."

5/ Other than possibly speeding up the disposition or resolution of the back pay claims, the record fails to set forth any other advantages that may inure to the unit employees by joining in the suit rather than awaiting the outcome of the task force set up to determine SSA's back pay liability to the individual employees.

6/ The circumstances surrounding this consent form will be discussed infra.

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forms which made no mention whatsoever, or provided for, contingency fees if he was successful in the law suit.7/

Thereafter, at a date not set forth in the record, Mr. Roof contacted Mr. James Rosa, AFGE General Counsel, concerning whether or not the Union would be amenable to making a contribution from the Union's Legal Rights Fund to the class action suit being handled by Mr. Banov. The Union concluded that the suit was a worthwhile endeavor and voted to give Mr. Banov a $5,000 retainer from monies in the Legal Rights Fund.

The November 1981, issue of The Government Standard, an official publication of the AFGE carried the following article on page 4:

NIGHT DIFFERENTIAL SUIT MAY AFFECT 10,000 WORKERS

> Over 10,000 government employees may be due to recover money owed them for night work which they regularly performed during scheduled overtime in the last six years. AFGE is attempting to recover the money for its members through a class action suit filed in U.S. District Court for the District of Columbia.
>
> The night pay differential suit was originally filed for SSA, DHS and Education employees, however, it is now open for all AFGE members who believe they qualify for the money under class action status. Washington attorney Alan Banov has been retained by AFGE to handle the case called Greenfield v. U.S.A.
>
> Any AFGE member who believes he or she is owed money because the government did not pay a 10 percent differential for work performed between 6 p.m. and 6 a.m. should complete the form at the right.

The form appearing at the right of the article entitled Consent To Representation By Law Offices Of Alan Banov In Claiming Backpay From The U.S. For Its Failure To Pay Night Pay Differential For Night Work Performed On Overtime states in paragraph 4 as follows:

> I agree to pay Mr. Banov 5% of any recovery if I am an AFGE member now, or 10% if I am a non-member.

7/ Mr. Banov testified that some 900 employees had signed consent forms which did not provide for contingency fees.

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With respect to the five and ten percent contingency fee differential assessed to members and non-members of the AFGE, respectively, on the consent form, both Mr. Banov and Mr. Rosa, in their respective testimony, made it clear that the reason for charging different contingency fees was the fact that the Union Legal Rights Fund was supported by dues paying members of the AFGE and that to charge the same contingency fees to members and non-members of the AFGE alike, would result in the dues paying members paying a higher cost of the law suit since the $5,000 retainer paid Mr. Banov came from the AFGE members prior dues payments.

Beginning on or about March 26, 1981, Mr. Banov wrote a number of letters to SSA wherein he urged the SSA to pay the night differential back pay claims filed by its employees. The March 26, 1981, letter made it clear that in "cooperation with Locals 1923 and 1760, AFGE," Mr. Banov was representing SSA's former and present employees. In a follow up May 11, 1981, letter in response to an SSA April 29, 1981, letter, Mr. Banov agreed to a meeting with SSA officials to discuss the pending night differential pay claims and requested that "Mr. Harold Roof and/or Elaine Minnick of Local 1923" be present at the meeting. In a subsequent letter dated June 17, 1981, wherein the results of the scheduled meeting were discussed, Mr. Banov demanded that in the future whenever SSA deemed it necessary to interview any individual claimant with respect to a back pay claim, that he be allowed the opportunity "to be present or to send an AFGE representative in his place."

Other correspondence in the record from Mr. Banov to the SSA indicates that copies of such correspondence were sent to Mr. James Rosa and Mr. Harold Roof of the AFGE.

In the summer of 1981, Mr. Banov filed a class action suit against the SSA seeking the payment of the employees night differential pay claims.

Discussion and Conclusions

Inasmuch as the facts do not appear to be in dispute, the paramount issue to be resolved is whether or not Mr. Banov's action in charging different or higher contingency fees to non-union unit employees denied equal representation to such employees in violation of Section 7116(b)(1) and (8) of the Statute.[8/]

8/ To the extent that Respondent challenges the Charging Party's standing to file the instant unfair labor practice, it is concluded that the Charging Party indeed has such standing. National Treasury Employees Union, 1 FLRA No. 104.

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Respondent, which would answer the question in the negative, takes the position that inasmuch as it is not the exclusive representative of employees in court actions, as opposed to grievance matters which could terminate in arbitration at the sole option of the Union, it was under no duty to accord equal representation, i.e., identical contingency fees, to union and non-union unit members alike. In support of its position the Union relies primarily on the decision of the Ninth Circuit in Archer v. Airline Pilots Assn., 102 LRRM 2827; and District Court decisions in Lacy v. Local 287, UAW, 102 LRRM 2847; Steele v. Brewery Workers Local 1162, 102 LRRM 2459, 2485; Hawkins v. Babcock & Wilcox Co., 105 LRRM 3438.

Respondent acknowledges, however, "that where a union has a right, derived from law, to represent the employees exclusively in a certain class of cases -- i.e., grievances . . . this right imposes a correlative duty not to engage in conduct which is arbitrary, discriminatory, or in bad faith."

The General Counsel and the Charging Party, on the other hand, would answer the question in the affirmative, citing in support of their position a number of NLRB cases which were based on the Supreme Court's decision in Vaca v. Sipes, 386 U.S. 171, and the Authority's decisions in NTEU Chapter 202, 1 FLRA 104 and FASTA, NAGE, 2 FLRA 103.

It is well established and conceded by the Respondent, that where a union is the exclusive representative and has the sole access to arbitration by virtue of the terms of the collective bargaining agreement, the union is under an obligation to accord equal representation to all unit members irrespective of union membership or allegiance. Vaca v. Sipes, supra; Tidewater Virginia Federal Employees, MTC, IAM Local No. 441 and Douglas Edwards Burns and Norfolk Naval Shipyard, 8 FLRA 47; Machinist Local 697, 91 LRRM 1529.

However, as noted by the Respondent, where the union, irrespective of its status as exclusive representative, does not have sole or exclusive control over the access to a particular forum or procedure through which an employee seeks redress, the union does not violate its statutory duty of fair representation when it fails to assist or process employees grievances in such forum. Archer v. Airline Pilots Association, 102 LRRM 2829; International Brotherhood of Workers v. Foust, 442 U.S. 42, 101 LRRM 2365.

With the above principles of law in mind, I now turn to the application of the facts in the instant case to the existing case law.

The record evidence establishes, and I find, that Mr. Banov was indeed an agent of the Respondent Union and that in such circumstances

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the Respondent Union was responsible for his actions. Thus, it is noted that Mr. Banov was retained by the Respondent Union to file a class action law suit on behalf of the unit employees represented by the Respondent because the Union hoped the suit would speed up the recoupment of the night pay differential allegedly owing to a number of such unit employees. Thereafter, the arrangement was published in the Union's newspaper along with a "consent to representation" form which provided for different contingency fees, depending on whether or not the affected unit employee was a member of the Union. Both Mr. Banov and Mr. Rosa acknowledged that the different contingency fee schedule was a product of their joint thinking and was an attempt to prevent Union members being assessed a greater amount of money than their non-union counterparts. If the contingency fees had been identical, Mr. Rosa and Mr. Banov were of the opinion that Union members would have been paying more money towards the cost of the class action suit, since the $5,000 retainer came indirectly in part from periodic union dues paid by the Union members. Additionally, the record make it clear that Mr. Banov was acting in behalf of, and in conjunction with, the Union with respect to the legal strategy and preparation of the class action law suit. In fact Mr. Banov informed the SSA that there should be no further discussions with individual employees concerning the night pay differential without either his or the Union's presence. Finally, Mr. Banov acknowledged that he met on a number of occasions with the Union representatives for purposes of discussing the status of the case and strategy.

Following the retention of Mr. Banov as its agent in the class action suit, the Union for all intents and purposes, was in the posture of attacking the SSA night differential pay problem on two fronts, i.e., grievance machinery and class action law suit.

Inasmuch as the collective bargaining agreement in effect gave the Union the sole access to arbitration, the final step in the grievance procedure, it and it alone, controlled the destiny or fate of the affected employees and thus according to Vaca v. Sipes and International Brotherhood of Workers v. Foust, supra, imposed upon the Union the duty and/or responsibility of equal representation of all unit employees, irrespective of union membership.

However, such was not the case with regard to the class action law suit since employees could join the class action law suit or seek their own counsel in a separate law suit without the permission or blessing of the Union.

In view of the foregoing conclusions, the question remaining for consideration or decision, is whether the Union's institution of the class action law suit was so integrally related to the pending grievances as to be part and parcel of such action, and thereby imposing upon the Union the duty of equal or fair representation.

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Had the suit been a substitute for arbitration, which was in the sole control of the Union, then it would appear that the question should be answered in the affirmative, since the Union would then be precluding unit non-union members from equal representation. However, the record facts do not support such a conclusion. In this respect, the sketchy facts in the record indicate that on the basis of the Comptroller's decision, there was no dispute as to the merits of the grievances concerning the liability of SSA for the night differential pay. It was only the amount, if any, due the employees which remained to be computed. To this end the parties had mutually agreed on a task force to investigate the facts underlying each and every claim. In such circumstances, until the research and/or investigation of the many many claims had been completed, and a possible dispute arose, there would appear to be no need for invoking arbitration. Accordingly, it appears highly unlikely that the class action law suit was intended to be a substitute for arbitration. Rather, it appears that such action was merely a vehicle for prodding the SSA to speed up action on the pending night differential pay claims which had been filed by both the Union and individual employees as grievances.9/

In conclusion, I find that it is only those proceedings that are in the sole control of the Union by virtue of its certification that impose upon the Union the duty of fair representation. To the extent that a Union opts to utilize other routes which are open to all employees and not within its sole control, as a supplement, but not a substitute, for pending grievance actions, as here, then the Union is not obligated to accord equal representation to all employees, irrespective of membership in the Union.

9/ Moreover, it should be noted that the record does not indicate that any of the employees involved in the night pay differential grievances will suffer any financial harm by not being a party to the class action law suit. It is possible that the back pay claims might be subject to a statute of limitations and that the filing of the class action law suit tolls any possible statute of limitations with respect to certain claims which might become stale during a protracted investigation of the grievances by the SSA task force. However, neither the General Counsel nor the Charging Party have elaborated or mentioned this aspect of the class action law suit, nor have they shown the why or wherefor of the class action law suit, or how its existence impacts upon the rights of individual employees to have their respective grievances processed by their exclusive representative in a non-discriminatory manner.

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Accordingly, I find that the class action suit herein constitutes a benefit of union membership as opposed to a right flowing from the Union's exclusive status as the collective bargaining representative, and conclude that under the circumstances the Union did not deny fair representation to the non-union unit employees by retaining an attorney to file a class action law suit and allowing the attorney to charge different contingent fees depending on whether or not the unit employee was a member of the Union.

In view of the above findings and conclusions, it is hereby recommended that the Complaint be dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: September 16, 1982
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
COLUMBIA AREA OFFICE,
COLUMBIA, SOUTH CAROLINA

Respondent

and

Case No. 4-CA-40009

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3654, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and a supporting brief, and the Respondent filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-40009 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, COLUMBIA AREA OFFICE COLUMBIA, SOUTH CAROLINA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3654, AFL-CIO Charging Party	Case No. 4-CA-40009

John Kosloske, Esq.
Linda B. Backus
For the Respondent

Pamela B. Jackson, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on December 14, 1983, by the Regional Director for the Federal Labor Relations Authority, Atlanta, Georgia Region, a hearing was held before the undersigned on January 19, 1984 at Columbia, South Carolina.

This is a proceeding which arises under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based upon a first amended charge filed on November 9, 1983, by American Federation of Government Employees, AFL-CIO (herein called the Union) against Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina (herein called Respondent).

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The Complaint herein alleged, in substance, that Respondent permitted Union representatives access to the Columbia, South Carolina office during non-work hours until about August 9, 1983; that on or about the aforesaid date Respondent refused to permit access by Union representatives to said office during non-work hours. It was further alleged that at no time prior to the said refusal did Respondent notify the Union of such contemplated action or provide the Union with an opportunity to bargain thereon -- all in alleged violation of Section 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated January 4, 1984, denied the existence of a practice, on or before August 9, 1983, whereby Union representatives had access to its office during non-work hours. It also denied the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union[1/] has been, and still is, the exclusive representative of specified professional and non-professional employees of Respondent.

2. Both the Union's Respondent are parties to a collective bargaining agreement which, by its terms, because effective for a three year period from November 19, 1979. The said agreement, which contained an automatic Renewal clause, was in effect at all times material herein.

3. The Columbia Area Office of HUD has been located, at all times material herein, in the Federal Building at Columbia, South Carolina. The building is open to the public between 7:00 A.M. - 5:30 P.M. on weekdays. At all other hours, and on weekends, the building is locked.

4. Under date of September 4, 1980, Jack Terry, the GSA buildings manager, wrote Respondent that effective September 13 GSA would issue to "Key personnel only" a key card to enter the building after normal hours.

1/ Although not spelled out in the record, it appears that Local 3654 AFGE was the local representative, on behalf of the Union, at the Columbia Area Office.

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Further, the agency was asked to submit a list of persons authorized to receive a key card.

5. In a memorandum dated September 8, 1980, Yvonne Hall, Respondent's Administrative Officer, submitted to Terry a list of supervisors and managers of the Columbia office to whom key cards should be issued.

6. Some of Respondent's supervisors also advised Hall that certain employees needed to gain access to the building before 7:00 A.M., or after it was locked in the evening, to perform job related work. Accordingly, Hall sent a memo to Terry dated September 23, 1980, requesting that key cards be issued to eight named employees of the agency. One of these individuals on the list was Marie Vevik.

7. Record facts show Marie Vevik has been employed by HUD since 1971. Between November, 1980 and September, 1983 Vevik held the position of Contractor Industrialist Specialist. She also was a supervisor from September, 1980 until December, 1981. Since September, 1983 Vevik has held the position of Wage Requirement Assistant, which position is located at Atlanta, Georgia.

8. In September, 1982 Vevik was designated as Union representative. She was president of Local 3654, AFGE, from January, 1983, to November, 1983, and the principal union representative from January, 1983 until October, 1983.

9. Since September 4, 1980, thirteen employees of Respondent have acted as Union representatives at the Columbia Area Office. Six of those representatives were issued key cards at the request of their respective supervisors. One of such representatives was Marie Vevik. In each instance the card was granted to the individual to perform duties relating to the employee's job. Union work had nothing to do with the issuance of the key card.

10. Marie Vevik's hours at the Columbia Area Office ran from either 7:00 A.M. to 3:00 P.M., or from 7:45 A.M. to 3:45 P.M., depending on her flextime schedule. Her testimony reflects that she started using the key card in September, 1982 to conduct union representational duties after hours or on weekends. Vevik used the xerox machine, and worked at her desk, to handle written material re grievances or EEO complaints.

11. Individual Daily Time Reports[2/] of Marie Vevik were introduced into evidence herein for the months of February, June, July, and August, 1983. Attached to each report is an appendix labeled "AFGE Union Representative Monthly Official FTS Report." These show the actual hours

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2/ Referred to a RETARS in the record herein.

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worked by Vevik and the date and time spent on union representational business. They reflect that time was spent by Vevik beyond the normal work hours, weekends -- but do not indicate where the time was spent by the union representatives.[3/]

12. According to Vevik, virtually all management officials knew she was performing union work after hours. She testified that the supervisors saw her using the xerox machine. In respect to Franklin Corley, manager of the office, Vevik testified she was sure he knew of her union activities during non-work hours; that she let him know she was there representing employees. As to the discussion with Corley, she testified they occurred at least one or two times between January and October, 1983, but the dates were not known; that the discussions took place in Corley's office. The Manager denied any knowledge of Vevik's performing union duties during non-work hours as well as conversing with her in regard thereto. Vevik also testified she discussed with supervisor Louis J. Wallace that she was putting in a lot of time working after hours on union work. Wallace denied seeing her doing union work, during such hours, or discussing with her the fact that she performed work after hours. Further, Vevik testified she ran into Mr. Nixon, the Housing Director, on weekends and told him she was giving out union material and using the xerox machine -- that she was on union time. James L. McDevitt, Jr. was Vevik's supervisor from December 7, 1981 until November 7, 1983. He testified that he saw Vevik perform representational duties on weekends; that Vevik had a key card when he was reassigned to the Columbia office; that he never discussed with Hall whether it was appropriate for Vevik to conduct union business after hours.[4/]

[3/] The General Counsel introduced in evidence Monthly Official Time Reports showing time worked by Vevik on Union duties during the months of February, June, July, and August, 1983. The log submitted by Vevik to management shows no such duties were performed in June either after hours or on weekends. In February and July the report reflects she worked one time each month in the office after hours. In respect to weekends worked by Vevik in the office, the logs show she worked thereat on union business as follows: 3 days in February, 8 days in July and 7 days in August.

[4/] I find that several supervisors were aware that Vevik was doing union work on weekends in the office. This conclusion is buttressed by McDevitt's testimony that he saw her performing representational duties at such times, as well as Nixon's failure to testify and rebut Vevik's testimony that she mentioned it to Nixon while working in the office on weekends. I credit Corley and Hall in regard to the fact that neither was aware that Vevik was using the key card to perform representational duties after hours or on weekends. In respect to Corley, and in the face of his denial, I conclude that the testimony of Vevik as to Corley's knowledge was imprecise. In respect to Hall, this official never reviewed the time reports and never observed Vevik performing union duties at non-work hours.

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13. Under date of August 3, 1983, Vevik, as principal Union representative, sent a letter to Hall wherein she requested that Flora Tewksbury, the president-elect of Local 3654, be issued a key card. Vevik stated that Tewksbury, as a principal representative of Local 3654, would be required on occasion to work after hours and on Saturdays to perform union duties.

14. The aforesaid request was denied by Hall in a memorandum dated August 9, 1983, addressed to Vevik. The management official recited therein that key cards are issued only for permitting employees to have access to their work stations during non-duty hours to perform official business for the government. Hall further stated that union officials have key cards because of their "official job requirements, and not because of their union duties."

Conclusions

General Counsel contends herein that a past practice had been established whereby Respondent permitted the president of Local 3654, AFGE, to use her key card to gain access to the office at times other then normal duty hours for representational duties. It asserts this practice existed from January - August, 1983 with the assent of management. Further, General Counsel maintain that Respondent's refusal to grant the new local union president a key card, to perform union related duties at such times, constituted a unilateral change in the said past practice. Since the Respondent had not bargained with the union as to the change, it is insisted that such failure to do so was violative of the Statute.

It is not disputed by the parties, and the law is well settled in the public sector, that no unilateral change in a condition of employment may be made by management without notifying the bargaining representative. Moreover, the employer will be required to bargain as to such change or its impact and implementation. The essential issue for determination herein is whether, as General Counsel asserts, a past practice did exist with respect to permitting Marie Vevik the use of a key card for representation duties during non-work hours.

It is also well settled that the parties may establish a condition of employment of practice, or other forms of tacit or implied agreement. In such instance, this practice may not be altered without bargaining thereon. Internal Revenue Service and Brookhaven Service Center, 6 FLRA No. 127; Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64.

The Authority has, moreover, laid down certain requirements which must be met before it can be concluded that a practice has ripened into a condition of employment. Thus, it must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and

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not challenged by the other for a substantially long duration. Essential factors in this regard are the knowledge by management of the practice and its consent, expressor implied with regard thereto. Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33; Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA No. 98.

Turning to the case at bar, I am not persuaded that between January - August, 1983[5/] the usage by Vevik of the key card to perform union duties at non-work hours was so notorious or continuous as to warrant concluding that a practice existed in this regard which ripened into a condition of employment. The record reflects, at the outset, that the key cards were issued to employees, including Vevik and other employees who acted as union representatives, solely for the performance of regular work duties at non-work hours. While it is true that Vevik may have used her card at such hours on numerous occasions to perform union duties, the record does not support the conclusion that such practice was consistently exercised with the imprimatur of management. The Time Reports submitted in evidence disclose only several days each in February, July, and August, 1983, when such duties were performed by Vevik after hours or on weekends.[6/] Moreover, Vevik confirms the fact that on frequent occasions she conducted her union tasks, i.e. using the xerox machine or writing reports, after her quitting time (3:30 P.M.), but prior to the time when the building was closed to the public (5:30 P.M.). Thus, it is that the degree of consistency in Vevik's adhering to this practice may not be sufficient to be labeled an employment condition in respect to this particular representative.

In respect to Respondent's consent to such practice, based on its knowledge and/or tacit approval thereof, it is asserted by General Counsel that various supervisors observed Vevik after hours and on weekends attending to representational functions. Such observance, however, does not suffice to establish that management permitted Vevik to use her key card at such times for such purposes as a regular occurrence. The fact that this employee was so seen by supervisors, or that she mentioned to a supervisor on occasion the nature of her tasks while on non-duty hours,

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5/ While Vevik testified she used the card since September, 1982 to perform representational duties, General Counsel contends the usage existed since January, 1983. Moreover, the time Reports introduced into evidence re her time spent on such activities all fell within 1983, and the conversations between Vevik and the supervisors were allegedly held during said year.

6/ No explanation was forthcoming, or appears in the record, as to the failure to adduce the Time Reports for the remaining months in 1982 or 1983.

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does not per se establish consent by the employer of such usage of the key card. Record facts disclose that neither Respondent's manager (Corley) nor its Administrative Officer (Hall) was aware that Vevik was using the key card after hours for union work. Further, permission had not been sought of, or granted by, management to use the card for such purposes.

The record herein fails to demonstrate that Respondent adhered to a practice of issuing key cards to union representatives for the performance of union tasks after hours. Apart from the fact that no other union official or representatives, to whom key cards were issued, ever utilized them for such purposes, no express permission was ever granted to Vevik to do so. Moreover, I am constrained to conclude no implied or tacit consent was granted by management to use the key cards as contended by General Counsel. The usage by Vevik in this respect at various times, even though brought to the attention of a supervisor, does not convince me that the use of the key cards for union purposes during non-work hours ripened into a condition of employment. Such knowledge by a supervisor is not, in my opinion, equatable with the imprimatur of, nor the sanction by, management as to the use of such cards.

General Counsel has not shown by a preponderance of the evidence that such a past practice was established and continued with the blessing or approval by Respondent. See Department of Defense, Department of the Navy, Polaris Missile Facility Atlanta, Charleston, South Carolina, 6 FLRA No. 67. Thus, I reject the argument that a condition of employment re such permission had existed since early 1983 which was changed later in the year. Accordingly, I conclude Respondent has not violated Section 7116(a)(1) and (5) of the Statute.

Having concluded that Respondent has not violated the Statute as alleged, it is recommended that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint in Case No. 4-CA-40009 be, and the same hereby is, dismissed.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: October 12, 1984
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
LOWRY AIR FORCE BASE
DENVER, COLORADO

Respondent

and

Case No. 7-CA-30298

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1974

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed. The General Counsel filed exceptions to the Judge's Decision, and the Respondent filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

IT IS ORDERED that the complaint in case No. 7-CA-30298 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE LOWRY AIR FORCE BASE DENVER, COLORADO Respondent	
and	Case No. 7-CA-30298
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1974 Charging Party	

Lt. Colonel Franklin E. Wright
For the Respondent

James J. Gonzales, Esquire
Joseph Swerdzewski, Esquire
For the General Counsel

Mr. Dariel S. Case
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1/, and the final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns the meaning of

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(8) will be referred to, simply, as "§ 16(a)(8)."

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§ 21(b)(3)(B) and specifically where a grievance is presented on employees own behalf; the employees do not want the exclusive representative's assistance; and there are no meetings or discussions, is the employer under a duty, pursuant to § 21(b)(3)(B), violation of which is an unfair labor practice, pursuant to § 16(a)(8) and/or (1), to: a) give the exclusive representative notice of the filing of the grievance 2/; and/or b) serve the exclusive representative with a copy of the grievance; and/or c) serve the exclusive representative with all documents and letters issued by the employer concerning such grievance? So far as I am aware, this is a case of first impression.

2/ The original charge alleged that:

> "Local 1974 charges the Commissary with interferring in internal affairs of the Local and failing to honor legitimately negotiated agreements on work schedules." (G.C. Exh. 1A).

The First Amended charge alleged that:

> "Since on or about February 5, 1983, and continuing to the present time, the Activity has failed or refused to provide the Union with all documents concerning a group grievance filed by unit employees which was processed under the provisions of the negotiated grievance procedure." (G.C. Exh. 1C).

Paragraph 9 of the Complaint alleges that:

> "9. On or about February 10, 1983, and at all times since, Respondent, through Day, or any other agent, has failed to notify the Union of the filing of the grievance . . . and has failed to serve the Union with a copy of the grievance and all documents and letters issued by Respondent concerning said grievance."

The allegation of Paragraph 9 of the Complaint that, "Respondent . . . has failed to notify the Union of the filing of the grievance . . . ." was not specifically alleged in the First Amended charge (nor in the original charge); nevertheless, Respondent has not asserted, either at the hearing or in its post-hearing brief, that this allegation of the Complaint was not encompassed by the allegation of the First Amended charge, ". . . the Activity has failed or refused to provide the Union with all documents concerning a group grievance filed by unit employees . . . ." Accordingly, as the allegation of the charge, "all documents concerning a group grievance", is sufficiently broad as to satisfy jurisdictional requirements for the allegation of Paragraph 9 in the absence of any contention to the contrary, the allegation of Paragraph 9 is deemed covered by the First Amended charge.

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This proceeding was initiated by a charge filed on March 24, 1983 (G.C. Exh. 1A), which alleged a violation of § 16(a)(1); and a First Amended charge filed on June 2, 1983 (G.C. Exh. 1C), which alleged violations of §§ 16(a)(1) and (8). The Complaint and Notice of Hearing issued on June 20, 1983 (G.C. Exh. 1E), pursuant to which a hearing was duly held on August 23, 1983, in Denver, Colorado, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved and were afforded opportunity to present oral arguement which each party waived. At the close of the hearing, September 23, 1983, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, upon timely motion of the Respondent, for good cause shown, to October 21, 1983. General Counsel and Respondent each timely mailed an excellent brief, received on October 24, 1983, which have been carefully considered. Upon the basis of the entire record 3/, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. American Federation of Government Employees, AFL-CIO, Local 1974 (hereinafter, also, referred to as the "Union"), is the exclusive representative of all eligible non-professional civilian employees employed by Lowry Air Force Base, Denver, Colorado (hereinafter, also, referred to as "Respondent"), as more fully set forth in the Agreement of the parties (G.C. Exh. 2, Art. 2).

2. On January 28, 1983, representatives of the Union and Respondent negotiated an agreement concerning the hours of work of all full-time and part-time Commissary sales store checkers (cashiers) (G.C. Exh. 3 Attachment). This agreement inter alia, changed the hours of work for full-time cashiers from 8:45 a.m. to 5:30 p.m. to 10:30 a.m. to 7:30 p.m., Tuesday through Friday. Part-time cashiers would work varying shifts with the early shift being 9:00 a.m. to 3:00 p.m. and the late shift being 2:00 p.m. to 8:00 p.m. (G.C. Exh. 3, Attachment). The new schedule was announced to employees, and posted, on January 28, 1983, to be effective February 8, 1983. Respondent on Saturday, January 29, 1983, met separately with the full-time and part-time cashiers to inform them of the new work schedules (G.C. Exh. 5, Par. 2). At the meeting with the full-time cashiers, Mr. Calvin Mullins, Commissary Officer, was asked to come to the meeting to explain the rationale for the change.

3/ General Counsel's Motion to Correct the Transcript, to which no opposition was filed, is granted, as modified, and the transcript is hereby corrected as set forth in the Appendix hereto.

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Mr. Mullins stated that the revised schedule was necessary, " . . . because we were needed during the revised schedule periods. He also stated that the action had been discussed with responsible persons and negotiated with the Union . . . ." (G.C. Exh. 5, Par. 4 a.), and after making these remarks, Mr. Mullins left the meeting.

3. The full-time cashiers were dissatisfied with the new schedule of hours 4/ and, on February 2, 1983, met with Mr. Dariel Case, President of Local 1974, Ms. Vickie Sampson, steward, and assistant commissary manager Tydinko (as spelled in Respondents Brief; the name is spelled in the transcript and G.C. Exh. 5 as "Tydingco"). Ms. Lillie M. Masby testified that they, the full-time cashiers, requested the meeting, " . . . to find out why we hadn't been notified . . . had been given no consideration whatsoever, and . . . part-time cashiers had been asked . . . their opinion, and we wanted to first find out with him [Mr. Case] just why is it that we were discriminated against and they [part-time cashiers] weren't." (Tr. 118). Mr. Case conceded that, "They wanted to -- they were curious as to why we hadn't sought input from them. They felt that it was unfair for us to negotiate those hours without having checked with them first . . . ." (Tr. 51). There is no dispute that Mr. Case stated at this meeting, ". . . that a person who was not a union member could not file within the Union a grievance against a union officer" (Tr. 123). Although it appears that Mr. Case's reference to "grievance" related to action within the Union (Tr. 73, 123), Ms. Masby very credibly testified that Mr. Case said, '"If you file a grievance, you wouldn't be represented anyway, because you know, if you are too lazy to get off your butts and go to the Union meeting and all this then I wouldn't bother to even look at your case.' Look at your grievance, I am sorry" (Tr. 122), from which Ms. Masby understood Mr. Case meant any grievance, "In my mind, it just -- just grievance, period. That's the way I took it." (Tr. 124-125). 5/

4. The full-time cashiers prepared a group grievance, dated February 5, 1983 (G.C. Exh. 5), which purported to be pursuant to AFR 40-771, which Ms. Masby and Ms. Cecilia Jones sought to file with Ms. Cheryl Lepard, Respondent's Chief of Labor and Employee Relations, on February 7, 1983. Ms. Lepard told Ms. Masby and Ms. Jones that: a)

4/ On February 1, 1983, the full-time cashiers had met with the EEOC Officer.

5/ The full-time cashiers filed an unfair labor practice charge against Mr. Case and/or Local 1974 on February 11, 1983, (Tr. 88, 120) which was settled on April 29, 1983 (Tr. 97, 99).

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". . . the 771 procedure was not appropriate and that they had to, since they were bargaining unit employees, use the procedure in the negotiated agreement" (Tr. 141, 106); and b) ". . . They said that they had informally discussed the grievance with the supervisor. Therefore, . . the next step was the first step formal . . ." and that ". . . they should submit the grievance to Mr. Day [Commissary Complex Director] at Peterson Field in Colorado Springs." (Tr. 141; 107). Ms. Lepard further told Ms. Masby and Ms. Jones that the second step would be to the Wing Commander at Lowry Air Force Base (Tr. 107). Ms. Lepard retained a copy of the grievance.

5. On February 8, the grievance was mailed to the Director, Rocky Mountain Complex Air Force Commissary Service, and was received on February 10, 1983 (Tr. 110). Before Mr Day responded, the employees wrote Colonel Kellum (the letter was not dated), Vice-Commander of Lowry Technical Training Center, the "second level" official, complaining of the lack of response to their grievance (G.C. Exh. 6). In the meantime, Mr. Day responded to the grievance (undated, but received by the employees on March 8, 1983, G.C. Exh. 7), as follows:

> "1. Your group grievance is being processed under the negotiated grievance procedure . . . rather than AFR 40-771, the grievance procedure you stated. This is required as you are bargaining unit employees represented by AFGE Local 1974.
>
> "2. As a result of your grievance, we are proposing to the union a different work schedule for the full-time sales store checkers.
>
> "3. While I cannot grant the total remedy you requested, I hope that the proposed schedule will provide flexibility to the full-time sales store checkers to work a more desirable schedule on a rotating basis.
>
> "4. I will notify you of the outcome of these negotiations on this matter. A copy of the letter to the union is attached.
>
> "5. I trust this will resolve your grievance." (G.C. Exh. 7).

The attachment (G.C. Exh. 9) referenced in Mr. Day's response was not received by the employees.

6. By letter dated March 9, 1983, to the attention of Mr. Day (G.C. Exh. 8), the full-time cashiers protested the refusal to accept the grievance under AFR 40-771 and requested a copy of the referenced letter to the Union which had not been provided as Mr. Day's letter had purported to show.

7. Both a copy of Mr. Day's undated response (G.C. Exh. 7) and Mr. Calvin Mullins' (Commissary Officer) memorandum (also undated) to Mr. Case were received by Mr. Case; however, Mr. Case was not given a copy of the group grievance (G.C. Exh. 5) at any time (Tr. 148). In his memorandum to Mr. Case, Mr. Mullins stated as follows:

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"We are proposing a change in the tour of duty for two of the full-time sales store checkers. Our proposal is to place two full-time sales store checkers on the 9:00 a.m. to 6:00 p.m. shift and rotate the full-time cashiers from their previously negotiated shift.

"Resquest your input no later than 21 March 1983." (G.C. Exh. 9).

8. By letter dated March 15, 1983, Mr. Case responded as follows:

"Concerning undated letter from Curtis Day, Commissary Director. Management's acceptance and adjudication of a grievance concerning tours of duty for full time cashiers constitutes an unfair labor practice by management on internal affairs of the union.

"The union negotiated in good faith with management to set up temporary schedules for cashiers less than thirty days ago. Management's failure to honor that agreement would constitute another unfair labor practice. Management had the obligation to inform the employees that they did not have a grievance and that the matter had been properly negotiated and therefore, was an internal union matter." (G.C. Exh. 10).

9. Respondent considered the grievant's letter to Mr. Day (G.C. Exh. 8), together with their earlier letter to Colonel Kellum (G.C. Exh. 6), as an elevation of the grievance to the second level (Tr. 144) and Colonel Swain by letter dated April 5, 1983, addressed to Ms. Masby, responded as follows:

"1. This is in response to you (sic) grievance. This grievance is being processed under the negotiated grievance procedure between Lowry AFB and AFGE Local 1974. This negotiated grievance procedure is the sole grievance procedure available to you since you are members of that bargaining unit.

"2. Management of the Lowry AFB Commissary and Local 1974, representing the bargaining unit, entered into negotiations on changing the work schedule of part-time and full-time sales store checkers so as to have more complete coverage of the store when needed. An agreement was reached between the Commissary Management and Local 1974 concerning the matter. After receiving your grievance, Mr. Day of the Rocky Mountain Complex offered to renegotiate some changes for you in this schedule. The union has declined to renegotiate. Also, since

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you did not consider this remedy to be sufficient, management has decided to remain with the schedule initially negotiated. 6/

"3. After carefully considering the facts as presented, I find I must deny your grievance." (G.C. Exh. 11).

10. Ms. Lepard testified that she had instructed one of her assistants, Mr. Vannoy, to furnish a copy of Colonel Swain's letter on April 5, 1983 (G.C. Exh. 11) to the Union (Tr. 145); however, Mr. Case testified that he never received a copy of General Counsel's Exhibit 11 (Tr. 61).

Conclusions

§ 21(b) of the Statute provides, in pertinent part, that:

> "(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall -
>
> . . .
>
> (3) include procedures that -
>
> . . .
>
> "(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding . . . ." (5 U.S.C. § 7121(b)(3)(B)).

The collective bargaining agreement of the parties (G.C. Exh. 2) does assure employees the right to present a grievance on the employee's own behalf and assures the exclusive representative the right to be present during the grievance proceeding. Thus, Article 24, Section E, Par. 2 a. provides:

> "a. An employee is entitled to a Union representative at any stage of the grievance procedure. Any unit employee may present and process a grievance under this procedure without the intervention

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6/ Although the issue is not before me, the record shows that on May 11, 1983, Respondent told the Union that it wanted to change the hours of duty of all full-time cashiers from that of 10:30 a.m. to 7:30 p.m. to 9:00 a.m. to 6:00 p.m., Tuesday through Friday. Mr. Case testified that the Union did not agree to any change (Tr. 85-86); but Mr. Mullins testified that Mr. Case agreed to the change (Tr. 129, 130) and, effective May 18, 1983, the hours of full-time cashiers were changed to 0900 - 1800, Tuesday through Friday and 0800 - 1700 on Saturday (G.C. Exh. 12).

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of the Union except that only the Union or the Employer may invoke arbitration. If the employee represents himself/herself, the Union will be given an opportunity to be present during the grievance proceeding." (G.C. Exh. 2, Article 24, Section E, Par. 2 a.).

Where, as here, the parties' negotiated grievance procedure fully complies with the statutory requirement that the negotiated grievance procedure "assure . . . an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding", is there any further right enforceable under § 16(a) of the Statute? For reasons set forth hereinafter, I conclude there is not.

Under the Executive Order, the Assistant Secretary consistently held that Section 7(d)(1), 7/ inter alia, did not confer any rights enforceable under Section 19[unfair labor practices]. U.S. Department of the Army, Transportation Motor Pool, Fort Wainright, Alaska, A/SLMR No. 278, 3 A/SLMR 290 (1973); Internal Revenue Service, Chicago District, A/SLMR No. 279, 3 A/SLMR 304(1973); U.S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280, 3 A/SLMR 310 (1973).

7/ Section 7(d)(1) of Executive Order 11491, as amended, provided:

> "(d) Recognition of a labor organization does not --
> "(1) preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulation, or from choosing his own representative in a grievance or appellate action, except when the grievance is covered under a negotiated procedure as provided in Section 13;"

§ 14(a)(5) of the Statute is substantially like § 7(d)(1) of the Executive Order and provides:

> "(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from --
>
> "(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or
>
> "(B) exercising grievance or appellate rights established by law, rule, or regulation;
>
> except in the case of grievance or appeal procedures negotiated under this chapter."

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I am aware that the Executive Order did not contain a provision like § 16(a)(8); nevertheless, as the Statute imposes no duty to serve the Union with a copy of any grievance filed by an employee, or group of employees, the allegation of the Complaint that Respondent committed an unfair labor practice by its failure "to serve the Union with a copy of the grievance and all documents and letters filed by employees and issued by Respondent, to which the Union was, and is entitled under 5 U.S.C. 7121(b)(3)(B) . . ." (Complaint, G.C. Exh. 1E, Par. 12), in violation of§ 16(a)(8) 8/ must be dismissed. Not only does § 21(b)(3)(B) not impose any duty to serve the Union with a copy of any document, including the grievance, filed by employees or issued by Respondent, but the tenor of the Statute is to the effect that the duty of an agency to furnish material to the exclusive representative is upon request. Thus, § 14(b)(4) provides:

> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -- . . . ."

The more difficult question is whether the statutory requirement, that any negotiated grievance procedure include procedures that ". . . assure the exclusive representative the right to be present during the grievance proceeding . . . ", carries with it the implied duty of management to notify the exclusive representative when a grievance has been filed by an employee, or by employees, on the employee's own behalf. Logic strongly indicates that, if the exclusive representative's "right to be present during the grievance proceeding", is to be assured, the exclusive representative must know that a grievance has been filed; but whether logical, or desirable, does the failure to give such notice to the exclusive representative constitute an unfair labor practice?

The Authority has made it clear that there is a duty to give the Union notice and an opportunity to be present at any meeting, Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 10 FLRA No. 36, 10 FLRA 172 (1982), where it stated, in part, as follows:

> "Reading Sections 7114(a)(2)(A) and 7121(b)(3)(B) together, it is clear that Congress intended that negotiated grievance procedures assure the exclusive representative the right to be present (represented) during formal discussions of a grievance, such as the discussions at issue in this case." (10 FLRA at 177).

8/ "(8) to otherwise fail or refuse to comply with any provision of this chapter."

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Respondent concedes that there is an obligation to give the Union notice of any meeting or discussion, but asserts that where, as here, there are no meetings or discussions 9/, § 14(a)(2)(A) does not apply, and § 21(b)(3)(B) imposes no obligation to give notice to the Union that an individual grievance has been filed. Office of Program Operations, supra, although the specific issue was not an allegation of the Complaint before the Authority, at least by inference, can be read as supporting Respondent's position. There, a unit employee filed on her own behalf a written grievance on, or about, November 7; at the first step of the grievance procedure, without any notice to the union or any meeting between the grievant and the supervisor, one item of the grievance was granted and the other four items raised by the grievance were denied. Grievant was not satisfied and appealed. Meetings were held with grievant at the second step, on December 12, 1979, and at the third step, on January 17, 1980. The Complaint alleged that the respondent violated the Statute by conducting formal discussions on December 12, 1979, and January 17, 1980. The Complaint did not allege that respondent violated the statute either by its failure to notify the union that a grievance had been filed or by its adjustment of the grievance at step one; and the Authority, as set forth above, addressed § 21(b)(3)(B) only in conjunction with § 14(a)(2)(A) and held, in essence, that there is a duty to give the union notice and an opportunity to be present at any meeting.

Each party has referred to the legislative history of the Statute, but the legislative history, beyond showing that S. 2640 had incorporated the language of the Executive Order (Legis. History p. 470-471); that Representative Clay's bill, H.R. 13, provided that any

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9/ I reject General Counsel's assertion that employees Masby and Jones' attempt to file the group grievance with Respondent's Chief of Labor and Employee Relations on February 7, 1983, constituted a formal discussion within the meaning of § 14(a)(2)(A) for the reason that the record shows that the grievance was not accepted, because as the employees were told: a) it could not be filed under the agency grievance procedure but, because they were bargaining unit employees, must be filed under the procedure in the negotiated agreement; and b) that it must be filed with the Commissary Complex Director at Peterson Field in Colorado Springs. The employees subsequently filed the grievance with the Commissary Complex Director who received it on February 10, 1983. Moreover, the Complaint neither alleges a "formal discussion" on February 7, 1983, nor that the Union was not afforded an opportunity to be represented at any formal discussion. To the contrary, the Complaint (Par. 9) alleges that Mr. Day, the Commissary Complex Director, "On or about February 10, 1983 . . . failed to notify the Union of the filing of the grievance . . . ."

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negotiated procedure, ". . . shall include procedures that insure the labor organization the right to be present when the grievance is adjusted if it is not the representative of the employee." (Legis. History, p. 162); that Representative Ford's bill, H.R. 1589 contained no similar provision; that when Representatives Clay and Ford combined their efforts in H.R. 9094 the provision of Mr. Clay's bill, H.R. 13, was adopted; that Mr. Nick's bill, H.R. 11280, provided that procedures, ". . . shall assure the labor organization the right to be present when the grievance is adjusted" (Legis. History p. 355); and that, after amendments, H.R. 11280 was reported on July 31, 1978, and then contained the language as passed (Legis. History p. 419), namely that procedure shall, ". . . assure the exclusive representative the right to be present during the grievance proceeding", sheds no light on the meaning of "proceeding" or on the reason that "proceeding" supplanted "adjusted" or "adjustment."

Certainly, the provision of the Executive Order ". . . opportunity to be present at the adjustment" (Section 13(a)) is not the same as the provision of the Statute, "to be present during the grievance proceeding" (§ 21(b)(3)(B)). Indeed, the word "proceeding" is broader than "adjustment" and, inter alia, means, "a particular step or series of steps adopted for doing or accomplishing something . . . necessary for brining the case to a successful conclusion" (Webster's Third New International Dictionary (1971)), which, in my opinion, would include Respondent's disposition of the grievance by Mr. Day's letter, undated but received by the employees on March 8, 1983, as, whether it constituted an "adjustment" of the grievance or merely a proposal to the Union, it was an act taken to resolve the grievance; in fact, Mr. Day's letter concluded by stating "5. I trust this will resolve your grievance" (G.C. Exh. 7).

Executive Order 11491 (October 29, 1969) in Section 7(d)(1) provided that Recognition does not:

> "(1) preclude an employee, regardless of whether he is a member of a labor organization, from bringing matters of personal concern to the attention of appropriate officials . . . or from choosing his own representative in a grievance or appellate action;"

but Section 13 made no reference to the exclusive representative being present at the adjustment of any grievance. This language first appeared in the 1971 amendments to Executive Order 11491 and Section 13(a) provided, in part, as follows:

> ". . . However, any employee or group of employees in the unit may present such grievance to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment."

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If § 21(b)(3)(B), like § 14(a)(2)(A), conferred a direct right to the exclusive representative, I would agree that a "right to be present during the grievance proceeding" carries with it the right to notice, violation of which would constitute an unfair labor practice; but § 21(b)(3)(B), rather than giving the exclusive a direct right, provides that;

"(b) Any negotiated grievance procedure . . . shall --

. . .

"(3) include procedures that --

. . .

"(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding . . . ."

Article 24, "Grievance Procedure" in Section E 2, provides as follows:

"2. Representation Rights

"a. An employee is entitled to a Union representative at any stage of the grievance procedure. Any unit employee may present and process a grievance under this procedure without the intervention of the Union except that only the Union or the Employee may invoke arbitration. If the employee represents himself/herself, the Union will be given an opportunity to be present during the grievance proceeding." (G.C. Exh. 2).

Section F. Procedural Steps provides, in part, as follows:

1. Employee Grievance . . .

a. Informal Discussion -- Within 15 calendar days of the action complained of . . . the employee will discuss resolution with the immediate supervisor, if the employee desires Union representation at this stage, notifies his/her immediate supervisor and steward . . . .

b. Fomal Grievance --

Step One. The written grievance shall be filed with the Group Commander or comparable level management official

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(reviewing authority) under which the employee serves . . . Within 15 calendar days from receipt of the grievance, a written decision will be provided to the employee. During the said 15 day period, the Reviewing Authority will consider all evidence, statements of the employee, and the Union representative, if the employee is represented by the Union, and conduct such investigation and interviews as in his/her opinion is necessary to resolve the complaint . . .

Step Two. A request for review . . . shall be directed by the Civilian Personnel Officer who will forward it immediately to the Final Administrative Authority (i.e., Vice Commander/LTTC). The Final Administrative Authority shall render his/her written decision to the employee within 15 calendar days . . . .

"2. Union Grievances . . . .

"3. Employer Grievances . . . . (G.C. Exh. 2)(Emphasis supplied)

By contrast, Section H of Article 24, which provides for expedited grievance/arbitration, states, in part, as follows:

" . . .

"3. . . . a notice of decision to remove an employee . . . will be delivered to the employee and the Union . . . .

. . .

"5. . . .

"b. Arrange as soon as possible . . . a meeting of the Union and the affected employee(s) . . . for the purpose of resolving the grievance . . . ." (G.C. Exh. 2)(Emphasis supplied).

The informal discussion stage of the negotiated grievance procedure appears to contemplate discussion by the grieving employee and the immediate supervisor without notice to the Union unless the employee wants Union representation (I express no opinion as to the effect of § 14(a)(2)(A) on the informal discussion since this issue is not before me). Step One of the formal grievance procedure contemplates consideration of statements of the Union only "if the employee is represented by the Union"; directs "such investigation and interviews" as the reviewing authority deems "necessary to resolve the Complaint." Meetings within the meaning of Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, supra, may well occur and, as noted previously, Respondent concedes an

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obligation to give notice to the Union and an opportunity to be present during formal discussion of a grievance; however the negotiated grievance procedure, neither in Section E 2 nor in Section F b, Step One, addresses specifically either notice to the Union or the right of the Union to be present in the absence of any meeting or discussion, and the right conferred by § 14(a)(2)(A) does not attach in the absence of a meeting or discussion of the grievance. Of course, not every breach of contract constitutes an unfair labor practice and, here, I find no clear breach of contract much less such egregious conduct as to constitute an unfair labor practice. See, Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA No. 90, 11 FLRA 516 (1983); Iowa National Guard and National Guard Bureau, 8 FLRA No. 101, 8 FLRA 500 (1982).

Obviously, where notice to the Union was desired, the negotiated grievance procedure so provided; and where a meeting was mandated, the negotiated grievance procedure also so provided. § 21(b)(3)(B) simply requires that any negotiated grievance procedure shall, inter alia, assure the exclusive representative ". . . the right to be present during the grievance proceeding" without providing at what point in the grievance proceeding the exclusive representative shall have the right to be present; and Respondent's construction and interpretation of the negotiated procedure to mean that the Union's right to be present at an individual's grievance attaches only when there is a meeting or discussion, as required by § 14(a)(2)(A), is not unreasonable but, to the contrary, is consistent with specific provisions of the negotiated procedure, including, for example, providing written decision "to the employee" (Steps One and Two); consideration of evidence and statement of the Union Representative "if the employee is represented by the Union". Beyond deciding that the record does not show a clear or patent breach of contract which could constitute an unfair labor practice, I express no opinion as to whether Respondent did, or did not, breach its agreement as,

> ". . . the appropriate avenue for resolution of the dispute is through the parties' mutually agreed upon contractual grievance and arbitration procedure rather than through the unfair labor practice procedures . . . ." Harry S. Truman Memorial Veterans Hospital, supra, 11 FLRA at 519.

As Respondent notes in its Brief (Respondent's Brief, pp. 10-11), under the Executive Order, the opportunity to be "present" at any adjustment was read to mean presence at some meeting. See, Local R7-51, National Association of Government Employees, A/SLMR No. 896, 7 A/SLMR 775 (1977); Internal Revenue Service, Memphis Service Center, Memphis, Tennessee, A/SLMR No. 444, 4 A/SLMR 717 (1974). No basis was shown for an independent violation of § 16(a)(1), i.e., the 16(a)(1) violation is premised on the asserted obligation arising from § 21(b)(3)(B).

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Having found that Respondent did not violate §§ 16(a)(1) or (8) as alleged, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 7-CA-30298 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 8, 1984
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WICHITA DISTRICT, WICHITA, KANSAS

Respondent

and

Case No. 7-CA-30514

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed. Thereafter the General Counsel and the Charging Party filed exceptions and briefs, and the Respondent filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon considseration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and Recommended Order.

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ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-30514 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WICHITA DISTRICT, WICHITA, KANSAS Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No.: 7-CA-30514

James E. Dumerer, Esquire
On Brief: Gary A. Anderson, Esquire
For the Respondent

M. Kathryn Durham, Esquire
On brief: William Harness, Esquire
For the Charging Party

James J. Gonzales, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1/] and the Final Rules and Regulations issued thereunder,

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(2) will be referred to, simply, as "§ 16(a)(2)".

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5 C.F.R. § 2423.1, et seq., concerns whether discipline, oral admonishment, for disclosure of taxpayer information to a non-employee union attorney in the course of a grievance procedure violated §§ 16(a)(2) or (1) of the Statute, i.e., whether such discipline was imposed as the result of the employees' participation in protected activity. This proceeding was initiated by a charge filed on July 28, 1983 (G.C. Exh. 1(a)) which alleged violations of §§ 16(a)(1), (2), (4) and (5) of the Statute; by a First Amended Charge, filed on November 7, 1983 (G.C. Exh. 1(b)), which alleged violations of §§ 16(a)(1) and (2) of the Statute; the Complaint and Notice of Hearing issued on November 18, 1983 (G.C. Exh. 1(c)); alleged violations of §§ 16(a)(1) and (2) of the Statute; and set the hearing for January 10, 1984. By Order dated December 7, 1983 (G.C. Exh. 1(f)), the hearing was rescheduled for January 19, 1984, pursuant to which a hearing was duly held on January 19 and 20, 1984, in Kansas City, Missouri, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity, to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and were afforded the opportunity to present oral argument which each party waived. At the close of the hearing, February 21, 1984, was fixed as the date for mailing post hearing briefs which time was subsequently extended, initially, upon motion of the Charging Party, National Treasury Employees Union (hereinafter, also, referred to as "NTEU"), with which Respondent and General Counsel joined, to March 8, 1984, and later, upon motion of Respondent, to March 12, 1984. Respondent, NTEU and the General Counsel each timely mailed an excellent brief, received on or before March 14, 1984, which have been carefully considered. Attached to the brief of the General Counsel was a motion to Correct The Transcript of Proceedings, to which no opposition was filed. General Counsel's motion to correct the transcript is granted, except as follows: the correction requested on p. 151, line 18, is actually on line 17, and is granted; the correction requested on p. 215, line 17, is denied (statement by Mr. Gonzales as it appears in the transcript may not be wholly accurate but the requested correction does not achieve any clarification); the correction requested on p. 346, line 23, is denied (Transcript appears wholly correct); the correction requested on p. 409, line 16, is denied (in context, it appears that "September", not "November", was the month stated in Mr. Gonzales' question as the transcript shows). In addition, on my own motion, I make the following corrections: page 61, line 5, "at" is corrected to read "to"; and the name of William K. Kasper, which appears in the Index (p. 308), and at page 384, line 22, page 385, lines 15, 19, 25, page 386, line 12, page 387, lines 17 and 20, page 456, lines 15 and 21 and page 460, line 10, as "William K. Casper", is corrected to read "Kasper." The transcript is hereby corrected as fully set forth in the Appendix hereto.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

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Findings

1. At all times material, NTEU has been certified as the exclusive representative of a consolidated unit of all professional and nonprofessional employees of the Internal Revenue Service, with certain exceptions more fully described in Paragraph 4(a) of the Complaint, which unit includes the Wichita District (hereinafter, also referred to as "IRS" or "Respondent"). The Kansas City, Kansas, office is a post-of-duty within the Wichita District. At all times material, a collective bargaining agreement (G.C. Exh. 2) was in effect covering the Wichita District.

2. Messrs. Robert B. Bates and Robert E. Moore are senior GS-12 Revenue Officers (RO) and at all times material were under the immediate supervision of Mr. Glenn Schreiber, Collection Group Manager (Tr. 41, 245, 279-280). On, or about, October 3, 1983, Mr. Bates transferred to the Lenexa, Kansas, post-of-duty (Tr. 41, 280) and ceased to be under the supervision of Mr. Schreiber. At the time of the hearing, Mr. Bates had been a RO for 18 1/2 years, a Group Manager from 1974-1977, when his Group was eliminated in a reorganization, and a senior RO for 12 1/2 years (Tr. 41). Mr. Moore has been a RO for over 16 years and a senior RO for 11 years (Tr. 245). Mr. Bates has served as President of Chapter 51 since 1979 (Tr. 44). Mr. Moore has been Kansas City steward for NTEU since about 1981 (Tr. 247). Mr. Schreiber's immediate supervisor is Mr. Kenneth N. Portz, Chief, Collection Division, Wichita, Kansas. Mr. Clarence M. King, Jr. is District Director and is also located in Wichita. Mr. King is Mr. Portz' immediate supervisor.

3. On November 4, 1982, Mr. Schreiber placed three of Mr. Bates' files in Bates' in box with instructions to initial the cases and return them to Mr. Schreiber. Mr. Bates quite correctly interpreted this as notice of documentation of his work performance for inclusion in his drop file. Mr. Bates testified that he had never before received negative drop file documentation and, after initialing the files, went to Mr. Schreiber's office with a copy of the files on November 8, 1982, and asked why he had been asked to initial these cases. Mr. Schreiber told Mr. Bates that these were examples of unsatisfactory work performance and he had an in-grade coming up three or four months down the line and it would be taken into consideration. Mr. Bates requested that union steward Moore come in and try to resolve this problem, to which Mr. Schreiber agreed, and Mr. Bates left Mr. Schreiber's office. Later that day, Messrs. Moore and Bates met with Mr. Schreiber. Mr. Bates began by stating that he had reached a point with his inventory of cases that he was unable to complete his work within the time periods that Mr. Schreiber desired; that his inventory was full of overage cases, large dollar cases and high priority other investigations. Mr. Bates stated that since Mr. Schreiber had begun documenting his cases and placing them in his drop file, he wanted to come to terms on what could be done to prevent this and asked for a list of priorities. Mr. Schreiber stated that if Mr. Bates cut out the horseplay around the office, using the telephone to talk about tennis, watering his plants, and, in general, using his time more effectively his inventory problem would

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not exist. He further stated that he had recently reduced the number of zip codes assigned to Mr. Bates and, as a result, he would be receiving fewer assignments. Mr. Bates further stated that he needed relief from the number of cases he had in order to carry out his union duties. Mr. Moore's memorandum of the meeting (G.C. Exh. 5-B), made within an hour after the meeting, and Mr. Moore's testimony (Tr. 272), indicates that Mr. Schreiber stated that he ". . . couldn't make allowances for that . . . ." [Mr. Bates' activity as Union President[2/]]; however, the parties all agreed that for the next 60 days Mr. Bates would receive no short deadline assignments; that Mr. Schreiber would indicate to Mr. Bates the priority he wanted cases worked; and that during this 60 day period Mr. Schreiber would cease further negative documentation of Mr. Bates' work (G.C. Exh. 5-B). Mr. Schreiber also pointed out that a number of cases in Mr. Bates' inventory contained payment agreements ". . . that he was just merely holding it and artifically inflating his inventory . . . that if he would transfer these in, it would reduce his inventory so it could be monitored by IDRS." (Intergrated Data Retrieval System, i.e., that payment agreements would be monitored by computer, rather than manually) (Tr. 382). Mr. Schreiber stated that Mr. Bates agreed to do this within the next 30 to 60 days. Mr. Schreiber wrote out an inventory priority, had it typed and gave Mr. Bates a copy on November 8, 1982 (G.C. Exh. 4). Mr. Schreiber's "Inventory Priorities" memorandum of November 8, 1982, stated, in part, as follows:

> ". . . You agreed to take most of the taxpayers you had on payment agreements and transfer them into Office Branch as your first priority. Your second priority would be giving appropriate attention to the large dollar cases . . . the third priority should be Other Investigations that had a definite deadline, such as a statute, discharge or subordination date. The fourth priority would be potential business seizures.
>
> "You asked for relief in the area of your inventory, and I agreed to divert any OI's that have short deadlines for the next 60 days . . . and during this period, I will abstain from documenting any other cases for placing in your drop file. You felt that at the end of this period you could have your inventory under reasonable control. . . ." (G.C. Exh. 4).

2/ On December 9, 1982, at the first step meeting on Mr. Bates' subsequently filed grievance, Respondent stated, ". . . orally that Bates was entitled to recognition of his union duties. . . ." (G.C. Exh. 22) and on December 9, 1982, ". . . A total of 25 Taxpayer cases were divided up between the other three Grade 12's (myself included) and one Grade 11. Bates' inventory was reduced to a total Taxpayer Caseload below the other three Grade 12's. Bates feels comfortable with the adjusted caseload. . . ." (G.C. Exh. 22).

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4. Being dissatisfied about the "negative documentation", on November 10, 1982, Mr. Bates submitted a written request to Mr. Moore to represent him ". . . regarding a potential grievance. . . ." and authorized Mr. Moore, ". . . obtain any information you may deem necessary. . . ." (G.C. Exh. 6). On November 10, 1982, Mr. Moore prepared a memorandum to Mr. Schreiber entitled, "In Contemplation of a Grievance Under the Agreement" in which he requested the following information:

> "All Form 5450 Collection Daily Time Utilization Reports submitted by the GS-12 Revenue Officers in Group III beginning with the time reporting period which began in May 1982.
>
> "All Form 795 Daily Report of Collection Activity submitted by the GS-12 Revenue Officer in Group III beginning with the time reporting period which began in May 1982.
>
> "Since this information is located in the Kansas City office, please provide it to me by Monday, November 15, 1982." (G.C. Exh. 7-A).

Mr. Moore gave Mr. Schreiber his memorandum requesting data in Mr. Schreiber's office and a discussion ensued. Mr. Moore stated that Mr. Schreiber went over it, ". . . to review exactly what it was that I wanted. He made the statement . . . 'Well, you're wanting all of the Grade 12 dailies? Do you want Neil Gregarson's daily?'" (Tr. 276-277). Mr. Moore said, ". . . no, we didn't need Neil Gregarson's dailies" (Mr. Gregarson was on extended sick leave and retired in 1982), and Mr. Moore stated that Mr. Schreiber then said,

> "'. . . so really all you're needing is four revenue officers' dailies? You and Bates have your own, right?' I said, 'Yeah, we've got our own.'
>
> "He says, 'Really, the only thing you need from me would be Jim Gaunce and Ken Kelley's dailies.' I said that would be fine.
>
> "Q. And did he say when the other two revenue officers' dailies would be furnished to you?
>
> "A. He wouldn't give me an answer. He said the group clerks were very busy." (Tr.277).

Mr. Moore stated that it was group clerks', ". . . responsibility to pull those files and make copies of them." (Tr. 278). Mr. Moore further stated that,

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". . . I walked away from there thinking, 'Well, I am going to use my dailies and Bob Bates' dailies, and the only thing that I am going to get from this information request is the dailies from Ken Kelley and Jim Gaunce, the other other (sic) two Grade 12's.'" (Tr. 279).

Mr. Moore stated that he told Mr. Bates, "'We're just going to use our own', something of that nature. We weren't getting the dailies that we had requested." (Tr. 280).

Mr. Schreiber did not recall the particulars of his discussion with Mr. Moore on November 10, but testified that, after making a xerox copy for his file, he sent the original to Mr. Merle Simpson, Labor Relations Specialist, and a copy to Mr. Portz. Mr. Schreiber stated that all information requests must be forwarded to the data management specialist, Mr. Simpson; that he was not "authorized to release information directly to the union." (Tr. 392); and that Mr. Moore ". . . knew that I could not release that." (Tr. 441). The data requested by Mr. Moore was, in fact, supplied[3/] on November 24, 1982 (Form 5450, Collection Daily Time Utilization Reports and Form 795, Daily Report of Collection Activity, for GS-12 RO in Group III, as requested by Mr. Moore, were supplied, ". . . void of any tax information or revenue officer identification. They have been numerically coded to identify the revenue officer if this becomes necessary." (G.C. Exh. 16A, memorandum of Portz to Simpson).

5. At some point, Mr. W. William Harness, NTEU National Counsel, decided that he and Ms. Durham, the NTEU staff attorney assigned responsibility for the Wichita District, should come to Kansas City on Monday, November 15, on the Bates matter. Ms. Durham notified Mr. Moore, apparently on Friday, November 12 (Thursday, November 11, having been a holiday), that they would be in Kansas City on Monday. Mr. Moore made it clear that when he had his discussion with Mr. Schreiber on November 10 they [Bates and Moore] did not know that the NTEU attorneys would become involved on the scene (Tr. 326). Also, apparently, on November 12, Mr. Moore made arrangements with Mr. Schreiber to use the Conference Room on November 15; but he stated he didn't ". . . recall any big conversation in regard to the Conference Room" (Tr. 280) and Mr. Schreiber was not asked about it. Mr. Moore stated that he couldn't recall whether he mentioned to Mr. Schreiber that the NTEU attorneys were coming but thought perhaps Bates had (Tr. 279); Mr. Bates said he did not tell Mr. Schreiber but

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3/ Notwithstanding Mr. Moore's assertion that, "We weren't getting the dailies that we had requested," there is nothing in the record to support such assertion, except in the sense that they were not going to receive them by November 15, 1982, the date Mr. Moore had asked that they be provided. As noted, all the data requested by Mr. Moore was provided on November 24, 1982.

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thought Mr. Moore had told Mr. Schreiber (Tr. 111); and Mr. Moore stated he didn't recall, discussing this upcoming meeting with the attorneys being present with Mr. Schreiber any time prior to November 15 (Tr. 325). Mr. Schreiber testified that he did not know that Harness or Durham would be in Kansas City on November 15 prior to November 15 (Tr. 385) nor did he have any discussion as to any meeting with NTEU attorneys prior to November 15 (Tr. 384). Having considered the testimony carefully, I fully credit Mr. Schreiber's testimony that he had not been advised of any meeting with NTEU attorneys prior to November 15 and that he did not know that either Mr. Harness or Ms. Durham was to be in Kansas City on November 15 until Mr. Bates introduced Mr. Harness and Ms. Durham to him on the morning of November 15 at which time Mr. Harness and Ms. Durham asked to meet with him later in the day.

6. Mr. Harness and Ms. Durham arrived in Kansas City on Sunday afternoon or evening November 14, 1982, and Mr. Bates met with them in Mr. Harness' hotel room (Tr. 118). Mr. Bates had his 795s with him and, at the request of Mr. Harness and Ms. Durham, gave them his 795s and left the 795s with the attorneys (Tr. 239-240). On the following day, Monday, November 15, 1982, after introducting Mr. Harness and Ms. Durham to Mr. Schreiber, Messrs. Bates, Moore and Harness and Ms. Durham went to the Conference Room and there Mr. Moore, at Mr. Harness' request, gave Mr. Harness his 795s to examine (Tr. 150, 282, 347). The RO Daily Reports contained taxpayer identification and it is conceded that no effort was made by the ROs to sanitize their reports or to mask in any manner the taxpayer identification; however, Mr. Harness asserts that he had no interest in taxpayer identification and that he looked only at the statistical information at the bottom of each report to get an idea of how Bates' inventory, productivity, and case assignments compared with Moore's. Using the 795s, Mr. Harness did make comparative statistical analyses.

7. At about 10:30 a.m. on November 15, 1982, pursuant to their request earlier that day, the parties met in the Conference Room. Present for Respondent were Mr. Schreiber and Mr. William K. Kasper, Examination Group Manager (Tr. 456). Mr. Bates was present with his representatives: Mr. Harness, Mr. Moore and Ms. Durham. Mr. Harness opened the meeting with strongly worded critical statements concerning Mr. Schreiber, including profanity (Tr. 435, 457-458), and a threat that ". . . we'll get you for this, Glenn" (Tr. 458) or ". . . Schreiber, we're going to get you . . . ." (Tr. 434), together with agitated finger pointing and fist shaking (Tr. 434-435). Mr. Harness' conduct resulted in Mr. Schreiber's getting up to leave the meeting; but Mr. Kasper told Mr. Harness that he ". . . thought he could conduct the meeting without that type of language or carrying on, and Glenn stayed in the meeting." (Tr. 458; see, also, Tr. 355). Mr. Bates' grievance (G.C. Exh. 9) was submitted during the meeting by Mr. Harness together with a request for information, dated November 12, 1982, and signed by Ms. Durham (G.C. Exh. 8), which requested some of the same information previously requested by Mr. Moore on November 10 (G.C. Exh.

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7-A) but in the main sought additional data.[4/] Mr. Harness' critical statements of Mr. Schreiber evoked the response from Mr. Schreiber that, "'You,' pointing to Harness, 'you and the union are going on the offensive' . . . 'I am rejecting the 60-day memo [G.C. Exh. 4] that I issued and I am going to start documenting Bates' lunch hours, his coffee breaks and everything in general.'"[5/] (Tr. 284, 356; G.C. Exhs. 11 and 12). Subsequently, Mr. Harness quoted case inventory statistics, including numbers of cases assigned, cases closed, and number of taxpayers. When Mr. Harness began quoting these statistics, Mr. Schreiber asked Mr. Harness where he had got that information and Mr. Moore replied, "From the Dailies" (Tr. 285). Mr. Schreiber then asked Mr. Moore, "Did you give him the dailies?" and Mr. Moore responded that he had. (Tr. 285). Mr. Schreiber then asked Mr. Moore, "Did you sanitize the dailies?" and Mr. Moore said "no." (Tr. 285). Mr. Moore stated that Mr. Schreiber ". . . pulled out his pencil and made a note of it and proceeded with the meeting." (Tr. 285).

8. Mr. Schreiber testified that, "Mr. Kasper had observed the same scene, and he knew that there had been an illegal disclosure made . . . because the NTEU attorneys are not members of IRS. So at the end of the meeting at 12:15 I went to my room . . . and called the Inspection Service . . . And I talked with Mr. Dave Lewis, and I told him what had happened. Mr. Lewis indicated . . . that it was a disclosure and that he was going to talk to his supervisor about it and decide how to proceed. And an hour or two later . . . he called back and said he had discussed the situation with the supervisor and they were in agreement that an illegal disclosure had been made, because the NTEU attorneys were not members of Internal

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4/ This request noted that:

> ". . . NTEU understands that many of the documents will be sanitized to protect the privacy of the taxpayer and the Revenue Officer. . . ." (G.C. Exh. 8).

5/ Mr. Harness met with District Director King on November 16, 1982, and by letter dated November 23, 1982 (G.C. Exh. 15-A), Mr. King stated, in part, as follows:

> ". . .I have determined that the comments made by Mr. Schreiber during your November 15, 1982, meeting were made in its heat of emotions after being subjected to intimidating comments; physical abuse, i.e., the raising of your voice and the manner in which you pointed your finger, and in general an other-than-business-like discussion laced with profanities . . . I have . . . received an agreement from Mr. Schreiber to adhere to the '60 day moratorium' he and Mr. Bates had worked out earlier. . . ." (G.C. Exh. 15-A).

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Revenue Service, and said he was going to run it by the United States Attorney's Office."[6/] (Tr. 388).

9. On November 16, 1982, Mr. Schreiber called Mr. Moore to his office[7/] and Mr. Moore stated that Mr. Schreiber asked, "'. . . Did you give your dailies to the attorneys? I said yes. He said, 'Did you sanitize them?' I said no. . . ." (Tr. 286). On November 19, 1982, Mr. Schreiber wrote a memorandum to Mr. Portz, Chief, Collection Division, Wichita District about the disclosure made by Revenue Officer Moore (G.C. Exh. 25-B) and on November 30, 1982, after his interview of Mr. Bates, wrote a memorandum to "Personnel - Attention: Merle Simpson" concerning the disclosure by Revenue Officer Bates (G.C. Exh. 25-C). Following Mr. Schreiber's memorandum to Mr. Portz and/or Mr. Schreiber's memorandum to Personnel, both Personnel and Mr. Portz sought the advice of the disclosure officer, Mr. James Manuszak who advised that the ROs were without authority to release the dailies to the NTEU attorneys, that ". . . the Code . . . clearly puts the determination of to and how much in the hands of management" (Tr. 493) and ". . . that information was not released according to the statute." (Tr. 494).

10. On December 3, 1983, Mr. Portz issued notices of proposed disciplinary suspension of three working days to Mr. Bates and to Mr. Moore for the unauthorized disclosure of official and confidential tax information to NTEU attorneys on November 15, 1982 (G.C. Exsh. 17 and 18).

11. On December 7, 1982, Mr. Bates contacted Mr. Portz and scheduled an oral reply hearing for himself and for Mr. Moore on January 5, 1983 (Res. Exh. 6).

12. On December 21, 1982, NTEU attorney Durham called Mr. Portz to discuss the pending actions against Messrs. Bates and Moore and expressed her desire to settle the matter and to avoid suspension of the employees. Mr. Portz agreed to consider her arguments and stated that he would call her the following day. Mr. Portz made a file memorandum of his conversa-

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6/ Mr. Lewis later that day called and stated that, ". . . the United States Attorney did not feel the case had jury appeal and that they would decline to prosecute it and that he was returning the information to Mr. King . . . to be handled administratively." (Tr. 388).

7/ Mr. Bates was in Wichita on November 16 (G.C. Exh. 15-B); but Mr. Schreiber interviewed Mr. Bates on November 29, 1982, and asked him if he had provided his dailies to NTEU attorneys and Mr. Bates said he had; that they were not sanitized; that the dailies contained taxpayer names; and that the dailies covered six months, ". . . May through October, 1982." (G.C. Exh. 25-C).

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tion with Ms. Durham (Res. Exh. 7). Mr. Portz called Ms. Durham on December 22, reviewed his memorandum of their conversation of the preceding day and Ms. Durham agreed that it correctly stated the essence of their conversation (Res. Exh. 8). Mr. Portz testified that he told Ms. Durham,

> ". . . that I had considered all the points that were made and that in view of the fact that there was a reply by telephone that I would consider this to be an oral reply or in lieu of an oral reply, and that I would reduce the proposed suspension of three days down to oral admonishment, which is the least disciplinary action given.
>
> "And that I would issue a letter to that effect. And there were two requests made, as I recall. One was I not issue a letter prior to December 27th, and the other was that a sentence be included in the letter, and that was that a copy of that letter would not be placed in the personnel file, official personnel file, or any other official file." (Tr. 464; Res. Exh. 8).

13. On December 27, 1982, Mr. Portz issued a letter to Mr. Bates (G.C. Exh. 26) and to Mr. Moore (G.C. Exh. 27) in which he notified each of them that the proposed three day suspension was reduced to an oral admonishment and that ". . . A copy of this letter will not be placed in your Official Personnel Folder or your Supervisory drop file. . . ." (G.C. Exhs. 26 and 27).

14. On January 4, 1983, Ms. Durham called Mr. Portz and complained that the letters did not, in her opinion, conform to the agreement she had reached with Mr. Portz on December 22. NTEU now alleged that the agreement was that the matter be dropped altogether rather than settlement by oral admonishment. There were repeated exchanges both written and by telephone between Mr. Portz, the employees, and Ms. Durham over the next two months and, finally, on March 23, 1983, Mr. Portz sent the employees, Messrs. Bates and Moore, a letter in which, to settle the dispute, he offered to reinstate the letters of proposed suspension and afford the employees the opportunity for an oral reply hearing which they had been demanding (G.C. Exh. 33). The employees agreed; on April 5, 1983, Mr. Portz again issued letters of proposed suspension (G.C. Exhs. 34 and 35); and an oral reply hearing was held by Mr. Portz on April 29, 1983, at which the employees were represented by Mr. Harness. On May 26, 1983, Mr. Portz issued his decision. Again, he decided that the employees would each receive an oral admonishment (G.C. Exhs. 38 and 39).

Conclusions

There is no dispute that the disclosure of taxpayer information to NTEU attorneys by RO Bates and Moore occurred in the course of preparation

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for a grievance proceeding. From this, General Counsel asserts, in part, that:

> "In this case, the very conduct which Portz cites for disciplinary purposes itself ["You made an unauthorized disclosure of official and confidential tax information. . . . On or about November 15, 1982, you provided unsanitized copies of your revenue officer dailies (Form 795) to NTEU Attorneys. . . ." G.C. Exhs. 17 and 18] is protected activity under the Statute. To be sure, Portz charged that there was an unauthorized disclosure ". . . to NTEU attorneys who were visiting the Kansas City, Kansas Office." (footnote omitted) However, the evidence is uncontroverted that these 2 NTEU attorneys and Moore, at all material times, were agents of the exclusive bargaining representative, were preparing a grievance on behalf of a unit employee, and therefore were engaged in activity protected under the Statute. . . . Their [NTEU attorneys'] examination of Bates' and Moore's Dailies was an integral component of the Union's representational function. . . ." (General Counsel Brief, pp. 28-29)

Similarly, NTEU asserts, in part, that:

> ". . . Bates and Moore were Union officials at all times relevant to this proceeding, that they were engaged in representational activity when they showed their Dailies to Union attorneys Harness and Durham, and that the discipline was motivated by the disclosure of the Dailies to Union representatives. . . ." (NTEU Brief, p. 13).

I fully agree, of course, that protected activity flowing from exclusive representation by a labor organization includes the right to file and process grievances, United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA No. 116, 3 FLRA 724 (1980); but the fact that the right to file and process a grievance is a protected right under the Statute begs the question. Engagement in the protected right of filing and processing a grievance neither obviates nor alters the confidentiality of taxpayer information mandated by the Internal Revenue Code, 26 U.S.C. § 6103, and if the disclosure of taxpayer information to NTEU attorneys by Revenue Officers Bates and Moore was in violation of the Internal Revenue Code and applicable Regulations, it was no less violative of the Code and Regulations because it occurred in the process of a grievance procedure.

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Stated otherwise, the umbrella of protected activity is not so broad as to encompass every aspect of conduct ancillary to that protected activity.8/

NTEU was entitled to data necessary and relevant to carry out its representational obligation in the processing of Mr. Bates' grievance, Veterans Administration Regional Office, Denver, Colorado, 7 FLRA No. 100, 7 FLRA 629, 637 (1982); Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California, 8 FLRA No. 108, 8 FLRA 547 (1982), and the record plainly shows that, inter alia, the Dailies (Form 795), requested by Mr. Moore on November 10, 1982 (G.C. Exh. 7-A), were both necessary and relevant to the processing of Mr. Bates' grievance. Indeed, the information requested by Mr. Moore on November 10, including the Dailies, and by Ms. Durham on November 15, 1982 (G.C. Exh. 8 - dated November 12 but not submitted until November 15, 1982), was furnished by Respondent on November 24, 1982 (G.C. Exh. 16-A). This case does not involve a request for data, pursuant to § 14(b)(4) of the Statute, which was denied. To the contrary, both the Internal Revenue Code, 26 U.S.C.§ 6103(1)(4), and Respondent's Regulations, 26 C.F.R. § 301.9000-1 (see, also, Federal Register, Vol. 46 No. 48, Thursday, March 12, 1981), provide the manner for disclosure of data involving taxpayer information; requests for such information were made; and Respondent supplied the requested information, so there is no issue concerning relevancy or necessity of the information requested.

Rather, the issue is whether the disclosure of taxpayer information by Revenue Officers Bates and Moore to NTEU attorneys Harness and Durham on, or before, November 15, 1982, constituted an unlawful disclosure. There is no dispute whatever that Messrs. Bates and Moore, at the request of the attorneys, did give Mr. Harness and Ms. Durham their Dailies (Forms 795). Indeed, Mr. Bates supplied his Dailies on November 14 and left them overnight with Mr. Harness in his hotel room and Mr. Moore supplied his Dailies to the attorneys on November 15, 1982. Nor is there any dispute that the Dailies contained taxpayer identification or that the Revenue Officer's copies of Form 795 are subject to the same degree of security as other taxpayer information in the possession of the Internal Revenue Service (Tr. 240-243, 266-267, 327-328, 336-337).

8/ Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, Las Vegas, Nevada, A/SLMR No. 796, 7 A/SLMR 150 (1977); United States Forces Korea/Eighth United States Army, 11 FLRA No. 79, 11 FLRA 434, 436 n. 3 (1983); Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 14 FLRA No. 20, 14 FLRA 103 (1984); Department of Defense, Army and Air Force Exchange Service, Fort Eustis, Fort Eustis, Virginia and National Association of Government Employees, Local R4-114, Case No. 4-CA-30433 (OALJ 84-85, July 5, 1984).

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Respondent asserts that,

". . . the exclusive procedure through which the forms 795 . . . 9/ could be shown to the union attorneys is that provided by § 6103(1)(4) [26 U.S.C. § 6103(1)(4)]:

"The Secretary may disclose returns and return information -

"(A) Upon written request -

"(i) to an employee or former employee of the Department of the Treasury, or to the duly authorized legal representative of such employee or former employee, who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee; or

. . .

"solely for use in the action or proceeding, or in preparation for the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding; or

"(B) to officers and employees of the Department of the Treasury for use in any action or proceeding described in subparagraph (A), or in preparation for such action or proceeding, to the extent necessary to advance or protect the interests of the United States.

9/ Respondent asserts in its Brief, "sanitized or not" (Res. Brief, p. 12); however, for the purpose of this proceeding I do not agree. In his proposed notices of disciplinary suspension (G.C. Exhs. 17 and 18), Mr. Portz stated, "Specification 1: On or about November 15, 1982, you provided unsanitized copies . . ." and the testimony of Mr. Schreiber clearly shows that he believed they had made an unauthorized disclosure of confidential taxpayer information to the attorneys because they had not masked or sanitized their 795s. Accordingly, I shall consider Respondent's assertion only as it applies to this case, namely, to unsanitized forms 795.

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"It is manifest and admitted that Bates and Moore both failed to comply with this statutory requirement before releasing the forms. They thus violated the Statute:

> "Returns and return information shall be confidenial, and except as authorized by this title -
>
> "(1) no officer or employee of the United States,
>
> . . .
>
> "shall disclose any return or return information obtained by him in any manner in connection with his services as such an officer or an employee or otherwise or under the provisions of this section." [26 U.S.C. § 6103(a)] (Res. Brief, pp. 12-13)(Emphasis in original).

General Counsel and NTEU urge several grounds as to why the disclosure of return information by RO Bates and Moore to the NTEU attorneys was not in violation of the Statute, 26 U.S.C. § 6103, or of the Regulations, 26 C.F.R. § 301, 9000-1 (G.C. Exh. 41), Internal Revenue Manual (IRM) 0735.1, Handbook of Employee Responsibilities and Conduct, § 229.1 (G.C Exh. 45), in substance as follows:

First, because the disclosure occurred in the course of preparation for a grievance proceeding the disclosure was part of protected activity and, therefore, was not an unauthorized disclosure. For reasons set forth above, I reject this assertion.

Second, use by grievant Bates and by steward Moore of their Dailies to prepare for and determine the merits of a grievance constituted protected activity; management can not dictate who will represent the grievant or the Union; and management can not lawfully withhold from one Union representative data which is available to another for the purpose of documenting a grievance (General Counsel's Brief p. 29); or, as stated in essence by NTEU, Mr. Schreiber told Moore that Moore and Bates had copies of their own Dailies and they should use them; Union attorneys representing Bates in a personnel matter are entitled to the return information; and Respondent's attempt to create a distinction between disclosure to Union representatives who happen to be IRS employees and disclosure to Union attorneys who are not employees of IRS is without merit (NTEU's Brief, pp. 14-17).

The short answer is that the Internal Revenue Code does, indeed, make a distinction concerning disclosure of taxpayer information to employees. Thus, subsection (h) provides as follows:

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"(h) Disclosure to Federal offices and employees for purposes of tax administration, etc. -

"(1) Department of the Treasury - Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes." (26 U.S.C.A. § 6103(h)(1)).

Tax administration is defined as follows:

"Tax administration - The term 'tax administration" -

"(A) means -

"(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

"(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions." (26 U.S.C.A. § 6103(b)(4))

See, United States v. Mangan, 575 F.2d 32, 39-40 (2d Cir. 1978), where Judge Friendly held, in part, that,

". . . the definition of 'tax administration' in § 6103 (b) (4) is so sweeping as to compel rejection of a restrictive interpretation. Clearly this case [fraud by an IRS Agent] involved 'the administration, management, [and] conduct . . . of the execution and application of the internal revenue laws' and 'assessment, collection, enforcement [and] litigation . . . functions under such laws'" (575 F.2d at 40).

The distinction is further apparent in 26 C.F.R. § 301.9000-1(c) which specifically states, in part, that,

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". . . The disclosure, including the production of internal revenue records or information to any person outside the Treasury Department . . . shall be made only with the prior approval of the Commissioner. . . ." (26 C.F.R. § 301.9000-1(c)) (Emphasis supplied).

The use of the Dailies by Messrs. Moore and Bates was not questioned; Respondent concedes that ". . . IRS employee stewards had been allowed to utilize tax return information to process grievances within the Service. . . ." (Respondent's Brief, p. 8); and this case does not involve any allegation of unlawful disclosure of taxpayer information as the result of the utilization or access to taxpayer information by IRS employees. Consequently, except to note that the Internal Revenue Code does make a distinction between employees of the Department of the Treasury and non-employees, it is unnecessary to decide, and would wholly inappropriate to decide as an issue that was neither raised nor developed on the record, the parameters of disclosure of taxpayer information among employees to process grievances within the Service. Steward Moore was free to use his Dailies and Mr. Bates' Dailies and he could have taken the "management information" (Tr. 503-504) from the Dailies, i.e. as distinguished from confidential taxpayer information, and supplied such "management information" to the NTEU attorneys, or Messrs. Moore and Bates could have sanitized their Dailies by blocking out confidential taxpayer information before delivering their Dailies to the NTEU attorneys without disclosing confidential taxpayer information; but neither was free to disclose confidential taxpayer information to the NTEU attorneys. Rather, disclosure of returns and return information may be made to non-employees of the Department of the Treasury only by the Secretary, or his designee, pursuant to § 6103(1)(4) of the Internal Revenue Code.10/

10/ I am aware that subsection (1) of 6103 is entitled, "Disclosure of return and return information for purposes other than tax administration" and that subparagraph (4) is entitled, "Disclosure of returns and return information for use in personnel or claimant representative matters" (26 U.S.C.A. § 6103(1) and (1)(4)). Obviously, as the Code is structured, information which was available, pursuant to subsection (h), to employees of the Department of the Treasury for tax administration purposes may cease to be for tax administration purposes and, therefore, obtainable, even by an employee, only pursuant to 6103(1)(4). As noted above, I express no opinion concerning the parameters of 6103(h).

The obvious distinction is that information disclosed pursuant to 6103(h) is specifically limited to employees of the Department of the Treasury for tax administration purposes, while information disclosed by the Secretary pursuant to 6103(1)(4) is neither limited to tax administration purposes nor to employees but is fully available to the "duly authorized legal representative." (See, also, Federal Register, Vol. 46, No. 48, page 1665, March 12, 1981).

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Third, that Mr. Schreiber authorized the utilization of the Dailies by the NTEU attorneys because he ". . . approved the use of those Dailies for representational purposes" (NTEU's Brief, p. 16); that ". . . Schreiber was aware prior to the November 15 grievance meeting that Harness and Durham would be reviewing the Dailies. . . ."; and that, ". . . Schreiber placed no restrictions on the use Bates and Moore could make of their Dailies" (NTEU's Brief, pp. 17-18); or as General Counsel asserts, ". . . Schreiber had assented to steward Moore's representational use of his and Bates' Dailies without restrictions. . . ." (General Counsel's Brief, p. 29).

The record shows, as Mr. Moore testified and as I have found, that on November 10, 1982, Mr. Schreiber did state to Mr. Moore that "You and Bates have your own [dailies], right?"; that Mr. Moore said "Yeah, we've got our own" and that Mr. Schreiber then said, "Really, the only thing you need from me would be Jim Gaunce and Ken Kelley's dailies" to which Mr. Moore responded ". . . that would be fine" (Tr. 277). The record is clear that Mr. Moore understood that he was going to use his dailies and Mr. Bates' dailies (Tr. 279); but Mr. Schreiber's comments concerned only Mr. Moore's use of his and Mr. Bates' dailies as an employee. Indeed, Mr. Moore stated that when he had his discussion with Mr. Schreiber on November 10 that neither he nor Mr. Bates knew that the NTEU attorneys would become involved on the scene (Tr. 326). Further, as I have found, Mr. Schreiber did not know prior to November 15, 1982, when Mr. Bates introduced him to Mr. Harness and to Ms. Durham, that either Harness or Durham was coming to Kansas City. While it is true that sometime after his meeting with Mr. Schreiber on November 10, apparently on November 12, as November 11 was a holiday, Mr. Moore made arrangements with Mr. Schreiber to use the conference room on November 15; but the record does not show that Mr. Moore mentioned to Mr. Schreiber that NTEU attorneys would be present. To the contrary, Mr. Moore testified that he didn't ". . . recall any big conversation in regard to the Conference Room" (Tr. 280) and further stated that he didn't recall discussing the upcoming meeting with the attorneys being present with Mr. Schreiber any time prior to November 15 (Tr. 325). In view of Mr. Moore's November 10 memorandum, Mr. Moore's subsequent request to use the Conference Room on November 15 would have appeared wholly consistent with Mr. Moore's handling of the contemplated grievance. Even if, contrary to my finding, Mr. Schreiber had been informed in advance that NTEU attorneys were coming to Kansas City, there is nothing in the record that shows, or even suggests, that use of RO dailies by anyone other than IRS employees, and specifically Messrs. Moore and Bates, was ever discussed or considered by Mr. Schreiber or by Mr. Moore in their discussion on November 10, 1982, and the record shows no subsequent discussion about the matter prior to November 15 except, possibly, that, as Mr. Moore testified, he ". . . did follow up several times on when we could expect the other two RO dailies" and that Mr. Schreiber said ". . . they would get to it as soon as they could" (Tr. 280-281) and it is conceivable that Mr. Moore could have made such a "follow up" on November 12; but if there were any "follow up" on November 12, the "discussion" was only as Mr. Moore indicated. Consequently, I reject the assertion of NTEU and the General Counsel that Mr. Schreiber's

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assent to steward Moore's representational use of his and Bates' dailies either directly or by implication authorized or permitted the use of the dailies for representational purposes by any person other than Mr. Moore, and certainly neither authorized nor condoned the use of the dailies by anyone outside the Department of the Treasury. Moreover, Mr. Schreiber testified that all information requests must be forwarded to the data management specialists; that he [Schreiber] was not authorized to release information directly to the union (Tr. 392); and that Mr. Moore knew that he [Schreiber] could not release the data Mr. Moore had requested (Tr. 441). As the procedures are spelled out in the Internal Revenue Regulations, the knowledge of Mr. Moore of the procedures, attributed to Mr. Moore by Mr. Schreiber, which was not denied by Mr. Moore, is both reasonable and unavoidable. Mr. Bates' knowledge of the Regulations must also be inferred not only because of his long service and general familiarity with IRS Regulations but because of his service as a supervisor and as an instructor (Tr. 42-43, 236).

Fourth, ". . . the Agency should be precluded from imposing discipline on Bates and Moore because the Agency . . . disclosed to Durham and Harness unsanitized, confidential tax return information. The information disclosed was significantly more confidential than the Dailies Moore and Bates showed Harness." (NTEU's Brief, p. 20) (See, also, General Counsel's Brief, pp. 17-18). While the dailies requested by Mr. Moore on November 10, 1982, were supplied on November 24, 1982, ". . . void of any tax information or revenue officer identification. . . ." (G.C. Exh. 16A, memorandum of Portz to Simpson), it is true that in response to Ms. Durham's request (G.C. Exh. 8), Respondent did supply various material in unsanitized form,[11/] including an unsanitized Delinquency Investigation Inventory Profile, unsanitized copies of the three case files entered into Mr. Bates' drop file, etc. Nevertheless, this argument begs the question. The fact that Respondent could, and did, disclose taxpayer information, pursuant to written request, it deemed necessary to resolve the issues involved in Mr. Bates grievance, does not mean that ROs Moore and Bates could disclose taxpayer information to non-Treasury Department employees, namely, NTEU attorneys Harness and Durham. In my opinion they could not.

Fifth, "This disclosure code of conduct training, which Bates himself also conducted as a supervisor and senior RO, did not identify any procedures or policies to be followed which might limit access to a Daily by an NTEU representative, regardless of whether that representative was an IRS employee or not" (G.C.'s Brief, p. 25); "The two Union officials

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11/ Note footnote 12 at p. 18 of General Counsel's Brief which quite correctly states that G.C. Exhibits 16(B), (C) and (D) were "sanitized" at the hearing at the suggestion of the undersigned; but were unsanitized when received by NTEU.

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testified that they were aware of no training course material or Service policy memorandum prohibiting them from showing their Dailies to a non-employee Union representative." (NTEU's Brief, p. 21). It is plain that nothing in the Internal Revenue Code or Regulations permits access to a Daily by a non-IRS employee. It is not disputed that a RO's Dailies containing taxpayer identification is subject to the same rules as to confidentiality as other return information and, while § 6103(h) of the Internal Revenue Code permits disclosure to employees of the Treasury Department for tax administration purposes, § 6103(1)(4) is both clear and unambiguous that only the Secretary, or his designee, may disclose returns and return information for purposes other than tax administration, upon written request - "to an employee . . . or to the duly authorized legal representative of such employee. . . ." (26 U.S.C.A. § 6103(1)(4)(A)(i)). Moreover, in a 1976 arbitration decision involving the Des Moines District and NTEU, where documents containing confidential taxpayer information had been sent to Mr. Robert M. Tobias, then Chief Counsel of NTEU, the arbitrator specifically stated,12/

> "The arbitrartor finds little in the Union's argument to justify the revelation of confidential information concerning a taxpayer except when the taxpayer in question is himself the employee facing discharge or other disciplinary action. The means for sharing with NTEU the pertinent information concerning other taxpayers by deleting confidential data should put the grievant-employee or his/her attorney at no disadvantage.
>
> "Accordingly, the arbitrator does not believe IRS employees have a right to violate disclosure rules and regulations on grounds of attorney-client privileges." (In the matter of Arbitration between: Internal Revenue Service, Des Moines District and National Treasury Employees Union, Chapter 4, at p. 8 (December 15, 1976) (A. Lee Belcher, Arbitrator). (G.C. Exh. 46).

Whether either Mr. Bates or Mr. Moore was aware of this arbitration decision, Mr. Harness certainly was (Tr. 371-372), and when he requested that RO Bates and Moore give him their dailies he did so with knowledge that IRS considered release of confidential taxpayer information by

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12/ In light of mitigating circumstances, the arbitrator found, however, that three day suspensions were too harsh and set them aside. Nevertheless, the arbitrator stated: ". . . In the case before the arbitrator, the Service properly sought to remind the grievants, and all other district employees through the resulting communications, of the rules and regulations concerning confidential information. . . ." (id., at p. 9).

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employees to NTEU attorneys constituted an unlawful disclosure and that arbitrator Belcher had concluded that such disclosure was not protected on the grounds of attorney-client privilege.

Similarly, in a 1980 arbitration decision involving the Austin District and NTEU, where the employee had disclosed confidential tax information to Congressmen and to the United States Civil Service Commission, the arbitrator upheld the three-day suspension and denied the grievance. The arbitrator considered, distinguished and rejected the applicability of the Des Moines decision, supra, for the reason that:

> ". . . the Arbitrator there [Belcher, Des Moines District, supra] specifically held that release of the information involved was not improper . . . because 'all such revealed information had lost its confidential nature' due to extensive media coverage and court records. That being the case, he held that Management's objective of reminding the grievants and other employees in the District of the rules concerning confidential information could have been effectively achieved through individual discussions, conferences, etc. Here, on the other hand, a clear-cut violation of the Rule has been established." (In the Matter of Arbitration between: Internal Revenue Service, Austin District and National Treasury Employees Union, Chapter 52, at p. 12) (May 12, 1980) (Raymond Goetz, Arbitrator) (Res. Exh. 4).

As this arbitration decision issued during Mr. Bates' incumbency as President of Chapter 51, there is a greater probability that he would have received notice from NTEU of this decision; but whether he, or Mr. Moore, had such notice, again, certainly, the knowledge of attorneys Harness and Durham of this decision can be inferred.

Accordingly, as the Internal Code and Regulations issued thereunder are quite specific concerning confidentiality of taxpayer information and make no provision for disclosure of confidential information to non-employees except in the manner set forth in 26 U.S.C.A. § 6106(1)(4), and the record not only fails to show any basis for a belief that such disclosure to NTEU attorneys was permissible, but, to the contrary, affirmatively shows that two arbitrators had held that disclosure of confidential taxpayer information by employees to non-employees was improper, I find no merit in the assertion of General Counsel and of NTEU. The proscription of the Code to employees is "Thou shalt not disclose confidential taxpayer information" and the Regulations provide, inter alia, that,

> "Any . . . employee who receives a request for internal revenue records or information, the disposition of which is not covered by a procedure established by the Commissioner, shall promptly communicate the contents of

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the request to the Commissioner through the appropriate supervisor. . . . Such . . . employee shall await instructions from the Commissioner concerning the response to the request. . . ." (26 C.F.R. § 301.9000-1(d)(2), G.C. Exh. 41).

It is not asserted that the request of the NTEU attorneys for Bates' and/or Moore's dailies was covered by any procedure established by the Commissioner other than that provided by § 6103(1)(4) of the Internal Revenue Code and implemented by Regulation, see 26 C.F.R. § 301.9000-1(c) (G.C. Exh. 41), Regional Commissioner Memorandum 12-80, Rev. 1, Par. E (G.C. Exh. 42), and, while the record does not disclose that Respondent's training addressed non-disclosure to non-employee representatives it is abundantly clear that its training fully addressed non-disclosure to any person, except as provided by the Internal Revenue Code. See, IR Manual 229.1, G.C. Exh. 45. Nothing in the Internal Revenue Code or the Regulations permits an employee to disclose confidential taxpayer to a non-employee representative and, while a record may be disclosed to unions recognized as exclusive bargaining representatives, Federal Register, Vol. 46, No. 48, Thursday, March 12, 1981, at p. 1665, such disclosure is governed by 26 U.S.C.A. § 6103(1)(4). Indeed, "legal representative" is specifically addressed by § 6103(1)(4) and having prohibited disclosure in the broadest of terms (6103(a)) and having provided for disclosure to a "duly authorized legal representative", in the broadest of terms, only pursuant to § 6103(1)(4)(A), Respondent had made it clear that its proscription on disclosure of confidential tax information by employees applied without limitation to persons, including "legal representatives", except as provided by the Internal Revenue Code and the Internal Revenue Code makes no exception whatever for union representatives; but, to the contrary, refers to representative only in the broad connation of "duly authorized legal representative" to whom disclosure may be made solely pursuant to § 6103(1)(4)(A). Although I am aware that Mr. Harness testified that he had previously used taxpayer information, he made it clear that, "The files . . . were furnished by the Internal Revenue Service" (Tr. 354) and while he stated that there were forms that had also been prepared by an employee and ". .. we used during the course of the hearing. . . ." (Tr. 354) and management was aware of this (Tr. 354), the record does not show whether such forms contained taxpayer information nor the circumstances involved in their use; however, as noted above, the two arbitration decisions referred to left no doubt that employee disclosure of confidential taxpayer information to a non-employee was proscribed. Nor, of course, did the arbitration decisions admit to any doubt as to the position of IRS concerning such disclosure of tax information by employees not in accordance with the Internal Revenue Code.

Sixth, that attorneys Harness and Durham ". . . did not see the taxpayer information. . ." because Harness was not ". . . interested in that information" (NTEU's Brief, p. 19). NTEU's assertion that "Bates provided the documents to Harness who reviewed them for the first time on

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Monday morning November 15. . . ." (NTEU's Brief, p. 19) is simply not true. Mr. Bates testified that he gave Harness and Durham his dailies, at their request, at the hotel on Sunday, November 14, and left them with the attorneys (Tr. 239-240) and Mr. Moore testified that he gave the attorneys his dailies, at their request, on the morning of November 15. In each instance, the complete forms 795s were furnished to the attorney and Mr. Moore testified that he told Mr. Schreiber that he had not sanitized the dailies (Tr. 285). As previously noted, if the 795s had been sanitized or if Messrs. Bates or Moore had furnished only the "management" information, I would have no hesitation in finding that there was no improper disclosure of taxpayer information; but that is not the case. The dailies, Forms 795s, were furnished complete; they had not been sanitized; and whether attorneys Harness or Durham utilized, or were interested in, the taxpayer identification contained thereon, there is no possible doubt that the confidential taxpayer information contained was, indeed, given to the attorneys and that this constituted a disclosure of confidential taxpayer information.

For all of the foregoing reasons, I conclude that Messrs. Bates and Moore made an unlawful disclosure of confidential taxpayer information by furnishing their Form 795s (dailies) to NTEU attorneys. I agree fully with Respondent that "It is manifest and admitted that Bates and Moore both failed to comply with this statutory requirement [6103(1)(4)] before releasing the forms. They thus violated the Statute. . . ." (Respondent's Brief, p. 13).

General Counsel (G.C.'s Brief, p. 34) and NTEU (NTEU's Brief, p. 22) further assert that union animus was, in any event, the reason for Mr. Schreiber lodging the charge of unlawful disclosure against Messrs. Bates and Moore. Thus, General Counsel asserts that, "This matter would never have reached Manuszak, Simpson, or Portz were it not for the discriminatory animus of Schreiber" (G.C.'s Brief, p. 34). I do not agree.

Although the record shows that Mr. Harness opened the meeting of November 15 on an acrimonious note with strong criticism of Mr. Schreiber laced with profanity, threats, finger pointing and fist shaking which did evoke Mr. Schreiber's response that, as the Union was going on the offensive, he was rejecting the 60 day memo that he had issued and that he was going to start documenting Bates' lunch hours, his coffee breaks and everything in general, the record shows that the sole motivation for Mr. Schreiber's inquiry was Mr. Harness' use of statistics which appeared to have come from IRS documents and Mr. Moore responded that it had come from the dailies; that he had given them to Mr. Harness; and that he [Moore] had not sanitized them. At that point, Mr. Moore stated that Mr. Schreiber made a note of it and proceeded with the meeting. Having learned of what appeared to him to have been an unlawful disclosure of confidential taxpayer information, Mr Schreiber was obligated to report it (See, for example, IR Manual 217.21, G.C. Exh. 45), and immediately after the meeting he did so by calling the Inspection Service. The Inspection

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Service agreed that there had been an illegal disclosure. All that followed flowed inescapably from the discovery of alleged disclosure of taxpayer information. No action, by Mr. Schreiber or by Mr. Portz, was brought about or motivated in any manner by union animus. Quite to the contrary, Mr. Portz, rather than harboring animosity, reduced the proposed three-day suspension to an oral admonishment.

While I find the lodging of charges of unlawful disclosure was not motivated in any manner by union animus, nor was discipline invoked because of protected activity, if, contrary to my finding, union animus were a factor, the record is clear and unequivocal that the position of IRS is, and consistently has been, that disclosure of confidential taxpayer information by employees to anyone outside the Treasury Department is unlawful except in strict compliance with § 6103, and once the disclosure by Messrs. Bates and Moore was discovered Respondent would have taken disciplinary action in the absence of protected activity. Internal Revenue Service, Washington, D.C., 6 FLRA No. 23, 6 FLRA 96 (1981); United States Department of Interior, Office of the Secretary, U.S. Government Comptroller for the Virgin Islands, 11 FLRA No. 91, 11 FLRA 521 (1983); Veterans Administration Medical Center, Buffalo, New York, 13 FLRA No. 46, 13 FLRA 283 (1983). Respondent's consistent position is well illustrated by the two arbitration decisions referred to above. In addition, of course, there is the mandate of the Internal Revenue Code, and Regulations, including, inter alia, Regional Commissioner memorandum 12-80, Rev. 1 (G.C. Exh. 42).

Because the imposition of discipline was lawful, i.e., was motivated wholly by discovery of an unlawful disclosure of confidential taxpayer information to non-employee attorneys, the fact that Mr. Moore had made an unlawful disclosure was a factor which Respondent properly considered in determining whether to recommend Mr. Moore for a high quality step increase and I find nothing impermissible in Mr. Schreiber's statement to Mr. Moore, as Mr. Moore testified, that,

> ". . . what you did was very serious. In fact, . . . you could have been prosecuted. The only reason you weren't prosecuted was that it lacked sufficient jury appeal . . . because of your poor judgment in turning those dailies over to an attorney, I was getting ready to turn you in for a high quality but I can't do it now . . . I can't submit the high quality . . . because of your poor judgment on this. Portz wouldn't sign it, the Director wouldn't sign it. I can't. I can't do it." (Tr. 290) (See, also, Mr. Schreiber's like testimony at Tr. 390-391).

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Accordingly, having found that Respondent did not reprimand employees Bates and Moore because they engaged in activity protected by the Statute and that Respondent did not thereby violate §§ 16(a)(1) or (2) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint is Case No. 7-CA-30514 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 10, 1984
Washington, DC

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LONG BEACH NAVAL SHIPYARD
LONG BEACH, CALIFORNIA

Respondent

and

Case No. 8-CA-30037

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and Recommended Order, and the General Counsel filed a response in opposition.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and Recommended Order, except as modified below.

The complaint alleged that the Long Beach Naval Shipyard, Long Beach, California (the Respondent) unilaterally implemented a change in the working conditions of bargaining unit employees by changing the policy and procedures used in connection with the use of coveralls in fibrous glass operations without first notifying the Federal Employees Metal Trades Council, AFL-CIO (the Union) and affording it an opportunity to bargain over the changes.

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In determining whether there was a unilateral change in a condition of employment, the Judge, relying on American Federation of Government Employees, Meat Graders Council, AFL-CIO and Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch, Washington, D.C., 8 FLRA 118 (1982), and American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 450 (1980), first concluded that the subject matter was negotiable in that it did not interfere with statutory and regulatory provisions, or protected management rights, and more particularly, did not interfere with the agency's right to determine the technology, methods, and means of performing work.2/ Upon resolution of the negotiability question, the Judge considered the record evidence and concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally implementing a change in the employees' working conditions without first providing the Union with adequate notice and an opportunity to bargain on the decision to change the type of coveralls worn by the employees and on the impact and implementation of such decision prior to its effectuation. Further, in view of such conclusion, the Judge, among other things, recommended a status quo ante remedy.

The Respondent primarily disagrees with the Judge's negotiability determination, arguing essentially that the Judge, in finding the subject matter herein negotiable erred in his interpretation and application of the two cases cited which did not involve section 7106(b)(1) of the Statute; that it is mandated by certain Government-wide regulations to require the use of approved personal protective equipment for safety and health reasons; that the subject employees in carrying out the agency's work are exposed to hazardous fibrous glass material; and therefore that the type of protective clothing (disposable coveralls) required by the Respondent is an instrument necessary to carry out its mission and thus constitutes "technology" and "means of performing work" under section 7106(b)(1) of the Statute, negotiable only at its election. Also, citing

2/ Section 7106(b)(1) of the Statute provides:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> > (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.]

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Article 25, Section 1 of the parties' contract, the Respondent contends that the Union, by such provision, waived its right to bargain over the Respondent's safety policy decisions.3/ Finally, the Respondent argues that a status quo ante remedy is unwarranted.

The Authority agrees with the Judge's conclusion that the Respondent's substantive decision concerning the type of protective clothing to be worn by the employees is within the Respondent's duty to bargain, noting particularly that the Respondent has provided no support for a finding that the subject matter is outside the duty to bargain because it is inconsistent with Government-wide regulations under section 7117(a)(1) of the Statute.4/ See American Federation of Government Employees, Meat Graders Council, AFL-CIO and Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch, Washington, D.C., supra (Union Proposal II). Also, the Respondent has not shown that bargaining on such matters would interfere with its right to determine "the technology" or "means of performing work" under section 7106(b)(1) of the Statute. In this regard, the Respondent has failed to show that the particular type of protective safety clothing worn by the subject employees as distinguished from the wearing of safety clothing, itself, is a technical method of performing work, i.e., the insulation of equipment in the pursuit of the Respondent's stated overall mission. Therefore, the Authority concludes that inasmuch as the Respondent's

3/ Article 25, Section 1 provides:

> The Employer shall provide and maintain safe working conditions for all employees working under the provisions of this Agreement and directives of higher authority.
>
> . . . . . .
>
> The Council will be notified of proposed changes to Shipyard safety policies and provided opportunity to submit recommendations and meet and confer on the impact of intended policy changes.

4/ Section 7117(a)(1) of the Statute provides as follows:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

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decision was to change the type of coveralls worn by the employees, it is negotiable as negotiation would not interfere with management's right under section 7106(b)(1) to require safety clothing to be worn. Rather, such issue principally relates to matters affecting employees' working conditions and is within the duty to bargain.5/ American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C. (and the case consolidated therewith), 7 FLRA 578 (1982) (Union Proposal XVI), enforced sub nom. Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280 (D.C. Cir. 1983). See also American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Department of Justice, Immigration and Naturalization Service, 8 FLRA 347 (1982) (Union Proposal 2), reversed as to other matters sub nom. U.S. Department of Justice v. Federal Labor Relations Authority, 709 F.2d 724 (D.C. Cir. 1983) and National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 254 (1979). Accordingly, the Authority concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally changing the type of coveralls worn by the subject employees without first providing the Union with adequate notice and an opportunity to negotiate on the decision to do so.

Having concluded that the Respondent's decision to change the type of protective clothing worn by unit employees is within its duty to bargain, and noting particularly that the Respondent did not provide the Union with adequate notice and an opportunity to bargain on such decision, the Authority finds that an order directing the restoration of cloth coveralls, including the policies and procedures in effect prior to the Respondent's change to disposable ones, is necessary to effectuate the purposes and policies of the Statute. U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116 (1982).6/

5/ With respect to the Respondent's contention that the Union waived its right to negotiate on the subject matter by Article 25, Section 1 of the parties' contract, the Authority has held that a waiver will be found only if it can be shown that the exclusive representative clearly and unmistakably waived its right to negotiate. Library of Congress, 9 FLRA 421 (1982); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). Here, neither the record nor the language of the agreement shows that the Union clearly and unmistakably waived its right to negotiate as asserted by the Respondent.

6/ As the Authority has concluded that the Respondent's decision to change the type of protective clothing worn by unit employees is itself within the duty to bargain, we find it unnecessary to reach and do not rely upon the Judge's application of the criteria in Federal Correctional Institution, 8 FLRA 604 (1982), in granting a status quo ante remedy herein.

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ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Long Beach Naval Shipyard, Long Beach, California, shall:

1. Cease and desist from:

(a) Unilaterally instituting any changes in policy or procedures in Shop 57 involving the type of coveralls to be used in connection with fibrous glass operations, including those associated with the use of cloth coveralls, without affording the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of certain of its employees, reasonable notice and an opportunity to negotiate concerning such changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the memorandum dated October 13, 1982, concerning the use of disposable coveralls, and restore the policy and procedures in effect prior thereto, including those associated with the use of cloth coveralls.

(b) Notify and, upon request, negotiate with the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of certain of its employees, regarding any intended changes in policy or procedures involving the use of coveralls in connection with fibrous glass operations.

(c) Post at the Long Beach Naval Shipyard, Long Beach, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer at said activity, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

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(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any changes in policy or procedures in Shop 57 involving the type of coveralls to be used in connection with fibrous glass operations, including those associated with the use of cloth coveralls, without affording the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of certain of our employees, reasonable notice and an opportunity to negotiate concerning such changes.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the memorandum dated October 13, 1982, concerning the use of disposable coveralls, and restore the policy and procedures in effect prior thereto, including those associated with the use of cloth coveralls.

WE WILL notify and, upon request, negotiate with the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of certain of our employees, regarding any intended changes in policy or procedures involving the use of coveralls in connection with fibrous glass operations.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 and whose telephone number is: (213) 688-3805.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

LONG BEACH NAVAL SHIPYARD LONG BEACH, CALIFORNIA Respondent	
and	Case No. 8-CA-30037
FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO Charging Party	

Alfred M. Jackson
Thomas R. Wilson
For the Respondent

Frank Rodriguez
For the Charging Party

Deborah Wagner, Esq.
For the General Counsel

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat. 1191, 5 U.S.C. § 7101 et seq. On March 4, 1983, the Regional Director for Region 8 of the Federal Labor Relations Authority, pursuant to a charge filed on November 1, 1982, and amended on February 25, 1983, by the Federal Employees Metal Trades Council, herein called the Union, issued a Complaint and Notice of Hearing alleging that the Long Beach Naval Shipyard, Long Beach, California, herein called Respondent or the Shipyard, had engaged in, and is engaging in, unfair labor practices

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within the meaning of Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, herein called the Statute, in that on or about October 14, 1982, Respondent unilaterally changed the working conditions for bargaining unit employees when it implemented a change in the policy and procedures used in connection with the use of coveralls in fibrous glass operations without first notifying the Union and affording it an opportunity to bargain over the changes. On March 10, 1983, Respondent filed an answer denying the allegations of the complaint. In its brief, Respondent contends that it had no obligation to bargain about the substance of its decision because it properly elected not to bargain about the technology and means of performing work. With respect to impact and implementation, Respondent contends that it did provide the Union with timely and adequate notice of its decision to conduct a study of the new coveralls, and that the Union's failure to present any specific proposals during meetings with Respondent constitutes a waiver of its right to bargain. Respondent opposes a status quo remedy.

A hearing was held in Los Angeles, California at which the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine, and cross-examine witnesses and argue orally. Briefs filed by Respondent and the General Counsel have been duly considered.1/

Upon consideration of the entire record in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact and Conclusions of Law

Insulators are bargaining unit employees in Shop 57 of Respondent's facility. Their work is primarily involved with insulating various types of equipment such as pipes, vents, boilers and high pressure vessels. Most of the Insulators work with fibrous glass every day. To protect them from the fibrous glass, Insulators were given safety equipment, including coveralls, hood, and gloves. In approximately April 1980, the Respondent came to the conclusion that the safety equipment provided to employees practically eliminated hazards of working with fibrous glass, and therefore under Federal regulations the employees working with fibrous glass would no longer receive differential pay. The Union challenged this conclusion, and the matter eventually went to hearing. In September 1982, the arbitrator rendered his decision, finding that the hazards had not been eliminated for employees performing work on board ships (Jt. Exh. No. 1). In what the General Counsel correctly

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1/ To the extent possible, I have adopted the proposed findings and conclusions submitted by the General Counsel.

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characterized as "clear dicta unnecessary to his findings," the arbitrator then went on to make the following comment:

> It is my considered opinion that the Employer may initiate appropriate studies to gather information over a reasonable period of time (six months to a year or more) to moniter [sic] the frequency and severity of skin irritation due to fibrous glass exposure and if such a study does in fact reveal that employees are not suffering significant distress while using the current protective devices, the Employer may consider discontinuing the differential on board ship (Jt. Exh. No. 1, p. 14).2/

About 1 month later, by memorandum dated October 8 (G.C. Exh. No. 2), it was announced that pursuant to the arbitrator's recommendation, Respondent was initiating a study to gather information concerning fibrous glass exposure. The memorandum announced that effective October 18, 1982, all personnel working with fibrous glass would wear disposable coveralls. Prior to this time, the employees had worn coveralls made of cotton cloth. In order to monitor whether the disposable coveralls resulted in fewer safety problems than the cloth coveralls, supervisors were directed to maintain a log of skin irritations, rips, tears, or melting of coveralls. The study of the safety of the disposable coveralls was scheduled to last 90 days. The memorandum was signed by William Jackson, Acting Head of Labor Relations, and was distributed to Code 106 (Safety Officer), Code 700 (Medical), Code 970 (Service Group), Code 907 (Shop 57), Code 930 (Mechanical Group) and Code 964 (Service Group). The memorandum did not show any distribution to the Union. The memorandum contained no language to the effect that the 90-day study was tentative or in any way subject to changes prior to the effective date of its implementation on October 18. Indeed, the memo instructed Code 700 (Medical) to provide the Shop involved and Code 106 (Safety) with copies of all referrals indicating skin irritation as a result of fibrous glass. Finally, the memo stated that on January 7, 1983, the study group would meet at 1300 in the Building 142 conference room to analyze the data obtained in the study.

2/ The instant case does not involve differential pay. At the outset, it should be noted that the arbitrator's award did not require the agency to set up a study to monitor the effectiveness of safety equipment in eliminating skin irritation due to fibrous glass exposure. Nor did the arbitrator's award specify what form the study should take or suggest that the Shipyard need not negotiate with the Union regarding such a study. The General Counsel contends that absent a clear and unmistakable waiver of the Union's statutory right to bargain regarding such a study, the Respondent is obligated to negotiate prior to implementation.

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From the evidence it is not clear whether the memo was being distributed directly to employees or whether it was an internal memo to supervising and management officials heading up these departments. However, it seems to me that the memo had all the earmarks of a final decision which already had been formulated and was now in the first stage of implementation, even though the so-called effective date was stated to be October 18 - 10 days later.

There is a dispute as to when the Union actually received the October 8 memorandum. Jackson testified that he hand-delivered it to Rodriguez the afternoon of Friday, October 8. If this were so, I don't understand why Jackson's self-serving memorandum "for the record" (G.C. Exh. No. 9) states that the purpose of his October 12 visit with Rodriguez was "to hand deliver (sic) a copy of my memo dtd 8 October 1983 . . ." Nor does the memorandum for the record state that the October 12 visit was requested by Rodriguez, as testified to by Jackson at the hearing. On the other hand, Rodriguez testified that he first received the October 8 memo from Jackson on October 12 or 13. Although Charles Schuster testified he saw Jackson give a piece of paper to Rodriguez the week after October 8, this testimony is not inconsistent with Jackson who said he gave the October 8 memo to Rodriguez on each visit. While Gerald Davis' testimony was quite credible it only is corroborative of Jackson's if Davis was correct about the meeting being on October 12 (rather than, for example on October 15). Because I found certain other aspects of Jackson's testimony not believable, and based upon my observation of his demeanor, I am inclined to resolve a close question against him and find that the Union received the October 8 memo late the afternoon of October 12.

In any event, I do not believe resolution of this issue is crucial. Assuming, arguendo, that the October 8 memorandum constituted timely and adequate notice of a proposed change in conditions of employment, I find that the Union promptly replied in timely manner with an oral bargaining request on October 12 and a written one on October 13 (G.C. Exh. No. 3). That the Union requested bargaining is quite clear. Thus, Rodriguez' testimony is corroborated by Charles Schuster, Chief Steward and Business Agent for the International Association of Heat and Frost and Asbestos Workers. Also, Respondent's own witness, Gerald Davis, Carpenter's Local 2431 President as of October 12, who became a Labor Relations Specialist on October 25, testified that he heard Rodriguez request Jackson to negotiate extending the study to 6 months.

It is also quite clear that Jackson categorically refused to negotiate the 90-day study and based his refusal on the arbitrator's decision. This conclusion is based upon the credited testimony of Rodriguez as corroborated by Schuster. Because of the Union's formal written request to bargain, Jackson called Rodriguez to set up a meeting to discuss the matter. Rodriguez asked that the meeting be delayed until the Union's attorney could attend, and Jackson agreed. The meeting was set for October 21, 1982.

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In the meantime, unbeknownst to the Union, the Superintendent of Shop 57, Larry Mauser, distributed a notice dated October 13 to Shop 57 Insulators, informing them that effective October 18, 1982, employees working with fibrous glass would be issued disposable coveralls rather than cloth coveralls. (See G.C. Exh. No. 4). A copy of this letter was sent to the Union, but due to the irregularities of the internal mail system, did not arrive for 3 or 4 days. Obviously, this was the second stage of implementing the October 8 memo, and constituted an announcement to employees of a change in conditions of employment. The copy being sent to the Union was nothing more than an information copy which the Union received after the employees had been told.3/

Separate and apart from Respondent's policy decision to require employees to wear disposable coveralls, Respondent also changed its procedures used in connection with the use of coveralls. A summary of these changes are set forth in Jt. Exh. No. 3. Thus, during the second week of October, in staff meetings held with employees of Shop 57, employees were told that since they were going to be issued disposable coveralls on the pier, there would be no need for them to use the locker rooms in Building 132 to store their clothes and tools. Instead, the employees would be issued footlocker-type tool boxes in which to store their clothes and tools. These tools boxes would be kept out on the pier.

Prior to October 1982, Shop 57 employees were allowed to use the locker rooms in the pad shop in Building 132. This building is located in the shipyard, a short distance away from the piers. Inside the pad shop were clean and dirty locker rooms. In the morning, Shop 57 employees would enter the clean locker room, store their street clothes in their lockers, put on the blue cotton coveralls, and then go through the shower and restroom area through another door and into the dirty locker room. The employees would then pick up their tools from the lockers on the dirty side. The employees were each given individual locks to put on their locker. At the end of the day, this process was reversed. The employees would enter the dirty locker room, take off the coveralls and seal them in plastic bags, and store their work tools in their locker. The old coveralls were exchanged for a clean pair each day. The employees would then go through the showers and restroom into the clean locker room where they would collect their personal belongings and then leave. The employees were given 10 to 15 minutes to work time, on the clock, for this cleanup procedure.

3/ The record does not establish whether Jackson, when he visited Rodriguez on October 12 to deliver the October 8 memo, already knew that Mauser was about to issue his memo to Shop 57 Insulators the following day. If so, this could have prompted Jackson's personal hand-delivery of the October 8 memo to Rodriguez in order to cure the earlier "oversight" in not sending the Union a copy.

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After October 18, 1982, these lockers were taken away from the employees. The employees now report directly to the worksite, on the pier, instead of the production shop. Because of this, the employees are released from the worksite 5 minutes later at lunch time and 10-15 minutes later at the end of the day, although they still punch in and out at the same time. Thus, they are given less time for cleanup and changing clothes. Respondent admits that the Union was given no prior notice of these procedural changes.

In the past, management had considered making some of these same changes in the procedures for Shop 57 employees to report to and from the worksite, and in the procedures for issuance of coveralls. On June 17, 1981, Judy Eveleth, who was then the Head of Labor Relations submitted proposals (G.C. Exh. No. 5) on these subjects to the Union. In a letter dated June 18, 1981 (G.C. Exh. No. 6), the Union requested negotiations. After several meetings were held, Respondent withdrew the proposed change and declared it would resubmit the proposals when negotiations for a new collective-bargaining agreement commenced.

On October 21, 1982, 3 days after the implementation of the change from cloth to disposable coveralls and the new procedures surrounding that change, the Union and the Respondent met to negotiate the October 8, 1982 memorandum. Present at the meeting for the Union were Rodriguez and Lindsay Bruce, a union steward who accompanied Rodriguez primarily to take notes. The Respondent was represented by Gilbert C. Bond, the Director of Industrial Relations, and Jackson, who, as mentioned previously, was the Acting Head of the Employee Relations Division of Industrial Relations. The Union asked to negotiate the change from cloth to disposable coveralls and the study announced in the memorandum dated October 8, 1982, but it is undisputed that Bond refused to negotiate it, claiming they'd been told by the arbitrator to do it.4/ The Union went

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4/ Bond's version of this meeting was that he was present for only several minutes but he never denied telling Rodriguez that he would not negotiate over the change in type of coveralls. As stated previously, Jackson testified that Rodriguez made no proposals on behalf of the Union. I do not accept this testimony, however, as it is inconsistent with other evidence in the record, including Jackson's own testimony. Thus, Jackson also testified that on October 12, 1983, Rodriguez proposed that a union representative be included on the committee that would monitor and evaluate the use of disposable rather than cloth coveralls, and also that the length of the study be increased. He further testified that on the 15th of October, Rodriguez informed Jackson that he wanted to discuss the NAVSEA directive which Respondent claimed gave them the authority to make the change, the names of the individuals on the committee and the agenda of the meeting the committee was supposed to

(Continued)

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through each paragraph of the October 8, 1982, memorandum (G.C. Exh. 2) and asked Respondent to explain it. The Union raised some safety problems, questioning the use of disposable coveralls in areas where hot work, such as welding, burning or working with hot pipes, was taking place. The Union's position was that disposable coveralls should not be worn any time there was hot work going on in the same room or compartment, and the Respondent agreed that it should depend on the distance between the hot work and the employees in disposable coveralls, not on whether it was in the same room or compartment.5/ Bond informed the Union the only change they were implementing was a change from cloth to disposable coveralls and they would not negotiate it. However, to placate the Union on the safety issue, the Respondent offered to set up a special safety committee, consisting of the Production Superintendent for the mechanical group, the head of Safety, the Director of Industrial Relations, and the President of the Union. This special safety committee could look into safety aspects of the entire Shipyard. The Union agreed to participate on such a committee.

The October 21, 1982, meeting ended with no further agreements between the parties.6/ There have been no meetings regarding the change

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(Continued)
have at the conclusion of the study. Jackson also admitted Rodriguez raised another issue which he could not recall. Jackson's response to these concerns was:

> After talking to him about the other two issues again, dealing with the person that he wanted on the panel, and the length of the study, again I repeated the same thing that I told him again -- No on each one.
>
> He then wanted me to negotiate the letter of the 8th, and I told him that I would discuss that letter of the 8th; I would not negotiate that with him. (Jackson, Tr. 79:14-20. Emphasis added.)

5/ Throughout his testimony, Bruce referred to the disposable coveralls as "Tyveck" coveralls. Although Counsel for Respondent pointed out that the coveralls worn by Shop 57 employees were Kimberly-Clark brand rather than Tyveck brand, he provided no evidence on that point. Schuster, who is an Insulator in Shop 57, explained that the employees sometimes refer to both types of disposable coveralls as Tyvecks.

6/ I credit the testimony of Rodriguez and Bruce with respect to the October 21 meeting, both as to the length of the meeting and the subject matter discussed. I specifically discredit Jackson's testimony that he did not recall Rodriguez making any proposals. Both Jackson and Bond
(Continued)

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from cloth to disposable coveralls since October 21, 1982. The special committee on safety has never been established in spite of the apparent agreement made at the October 21, 1982, meeting.

Discussion

It is well settled that an agency may not make changes in conditions of employment without first properly notifying an exclusive representative and affording it an opportunity to negotiate. Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA No. 22, 6 FLRA 74 (1981); Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981). I find that Respondent effected such a change on and after October 18, 1982, by unilaterally requiring employees in Shop 57 to wear disposable paper coveralls rather than the cloth overalls employees had been wearing for years. Moreover, the Respondent made this change in the face of a proper request to negotiate by the Union, on October 13, 1982, and Respondent, through Bill Jackson and Gilbert Bond, clearly refused to negotiate the type of coveralls to be worn by unit employees.

Apart from the unilateral change issue, the instant case also presents the issue of whether the type of clothing to be worn by Insulators is negotiable. In American Federation of Government Employees, Meat Graders Council, AFL-CIO, and Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch, Washington, D.C., 8 FLRA No. 25, 8 FLRA 118 (1982), the Authority found a union proposal that the employer furnish protective clothing such as a cooler coat and gloves to the employees was negotiable. The Authority held that a proposal to furnish protective clothing did not interfere with statutory and regulatory provisions, or protected management rights. Respondent contends that the Authority's decison is limited to an agency's obligation "to provide" protective clothing but cannot be extended to encompass "the kind" of protective clothing. Contrary to Respondent's contention it seems more logical that the right of a union to negotiate whether protective clothing be furnished to employee, also encompasses the right to negotiate the type of protective clothing; i.e. whether it be made of cloth, paper, asbestos, lead, or whatever. It seems to me, for example, that a union has a vital interest in ensuring that protective clothing be flame-resistant in areas where employees are working with blowtorches. In my opinion, giving the union the right to bargain on what those coveralls will be made of, does not interfere with the agency's right to determine the technology, methods and means of performing work. The Insulators will continue to perform whatever work they are assigned, with the tools they are given to do that job. The

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(Continued)
admitted that there was discussion about the safety committee. In addition, Bond recalled Rodriguez mentioning that cloth overalls "were the way to go" and that the disposable coveralls were unsatisfactory.

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provision of protective coveralls, whether they be made of plastic, paper, or cotton cloth has nothing to do with the technology of performing work. See also Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA No. 62, 2 FLRA 450 (1980).

As previously noted, the unilateral change complained of here is not confined to Respondent's decision to use a different type of coverall in a 90-day study. It is abundantly clear that Respondent also instituted a number of related changes in working conditions (see Jt. Exh. No. 3) such as eliminating the locker rooms, reducing the amount of cleanup time, and requiring employees to report to their worksite instead of to the production shop. As noted, supra, an agency may not make changes which affect conditions of employment without first affording the union an opportunity to bargain. Internal Revenue Service, Los Angeles District, 10 FLRA No. 107, 10 FLRA 653 (1982); Norfolk Naval Shipyard, Portsmouth, Virginia, supra. Here, the employees in Shop 57 learned of the changes before the Union did. There is no question but what these changes had a substantial impact of an adverse nature by the affected employees.

In its own defense, Respondent offers a number of arguments, each of which is hereby rejected. First, the October 8 memorandum (delivered on October 12) was not adequate notice. It barely gave the Union an adequate amount of time in which to timely request bargaining, no less prepare any bargaining proposals, except those which would come to mind, off the top of one's head, so to speak. Certainly, it did not provide adequate time to also complete the bargaining prior to October 18. Therefore, once the Union requested bargaining - which it formally did on October 13 - the Respondent was obliged to postpone the October 18 implementation date, absent an emergency situation justifying no postponement. There clearly was no emergency requiring the 90-day study to be put into effect on October 18. While it may have simplified matters had the Union formally requested a postponement, I do not believe it was required in the circumstances of this case, particularly in view of Respondent's agreement to meet on October 21. I believe the Union had a right to assume that its request to negotiate served as an implicit request to postpone the implementation date until bargaining about the proposed changes were completed.

Second, the Union's request to bargain on October 12 and 13 only went to the proposed changes about which it had been informed. As of then, the Union only knew of a 90-day study utilizing disposable instead of cloth coveralls. It did not know about, and therefore couldn't request bargaining about, all the significant changes in procedures set forth in Joint Exhibit No. 3. Clearly, the Union did not have adequate notice of these changes.

Third, contrary to Respondent's contention, I do not find any evidence that Respondent and Union were involved in any negotiations prior to October 21. The only purpose served by the brief encounters on October 12 and 15 was for the Union to orally make some proposals and to

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set a date for formal negotiations. In this regard, Respondent argues that the Union's failure to make proposals prior to the announced implementation date gave the Activity the right to proceed with implementation. While this may be a proper subject for ground rules negotiations, nothing in the Statute requires the submission of proposals prior to a face-to-face meeting of the parties. Respondent admits there is no past practice of submitting proposals prior to meeting at the Shipyard. Respondent could have submitted such a proposal if it wished to negotiate over ground rules, but it may not impose such a requirement on the Union after the fact. In any case, the Union did make at least some proposals. There was evidence that the Union has orally proposed increasing the length of the study, including a union representative on the committee which would monitor the study, and limiting the use of disposable coveralls where welding or other "hot work" is taking place. Although some of the Union's proposals may not be negotiable, Respondent must give the Union an opportunity to revise its proposals so as to make them negotiable if it asserts they are not negotiable and must bargain with the Union on those proposals which are negotiable. The Adjutant General's Office, Puerto Rico Air National Guard, 3 FLRA No. 55 (1980), 3 FLRA 342. In any event, Respondent is in no position to complain about the nature and extent of the Union's proposals. It is well settled that management is required to give the union sufficient notice of an intended change to provide the Union with enough time to offer proposals and exchange views in respect thereto. Where the union does not have sufficient time to prepare proposals, the Activity has violated the Statute by failing to provide sufficient notice. San Antonio Air Logistics Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA No. 22 (1981). In conclusion, I find that Respondent violated Section 7116(a)(1) and (5) by unilaterally implementing a change in working conditions without first providing the Union with adequate notice and an opportunity to bargain over the decision and its impact and implementation, prior to implementation of the decision. Here, Respondent implemented the changes prior to completion of negotiations and prior to impasse. Department of the Treasury, United States Customs Service, Region VIII, San Francisco, California, 9 FLRA No. 68, 9 FLRA 606 (1982).

REMEDY

When an employer fails to bargain concerning a change in conditions of employment which is substantively negotiable, the Authority has held that a status quo ante remedy is required. "Such conclusion is supported by the literal language and the legislative history of the Statute and is necessary in order to avoid rendering meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment." U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA No. 15, at p. 119 (1982). The changes in working conditions that took place in the case at hand include both the change from cloth to disposable coveralls, and the changes in the procedures incident to the

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issuance of coveralls and reporting and departing from the worksite. This encompasses a number of different factors. For example, the Shop 57 employees now report directly to their worksite instead of to the Production Shop. Timecards are distributed to employees on the pier next to the worksite, instead of in the Production Shop. The employees must dispose of their coveralls and clean up in the restrooms located on the piers instead of being allowed time for cleanup purposes in the locker rooms in the Production Shop. This last mentioned change led to a decrease in the amount of cleanup time provided to the employees as the Respondent unilaterally determined that the employees did not need as much time to clean up as they had formerly required. All of these changes are substantively negotiable. Therefore, the General Counsel argues that a status quo ante remedy is required to effectuate the purposes and policies of the Statute.

In Federal Correctional Institute, 8 FLRA No. 111 (1982) at p. 606, the Authority listed five factors which must be considered in determining whether a status quo ante remedy is appropriate in a case where the employer is obligated to bargain on the impact and implementation of its decision. These factors are:

(1) Whether, and when, notice was given to the union by the agency concerning the action or change decided upon;

(2) Whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change;

(3) The willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute;

(4) The nature and extent of the impact experienced by adversely affected employees; and

(5) Whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

In the present case, application of these factors leads me to the conclusion that a status quo ante remedy must be imposed. Applying the factors to the case at hand, (1) the Union was provided inadequate notice of the change from cloth to disposable coveralls and was provided no notice at all of any other changes which were implemented in connection with the change from cloth to disposable coveralls. (2) The Union almost immediately requested to negotiate upon this change. (3) The evidence strongly suggests that the Agency's failure to bargain was deliberate and

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intentional. To begin with, the October 12 notice to the Union appeared to be an afterthought, since copies of the memo had already been sent to many departments and Mauser's notice to Shop 57 employees was dated October 13. Further, the Respondent failed or refused to provide the Union with any notice of the attendant procedural changes. The fact that the agency had proposed some of these same changes the previous year, and had subsequently withdrawn the proposal, suggests that the failure to notify the Union in this instance may have been intentional. The agency apparently hoped that it could avoid the inconvenience of fulfilling its bargaining obligations by simply implementing the change and accepting the consequences. (4) Taken together, the various changes in procedures, as well as the change from cloth to disposable coveralls had a subtantial adverse effect on the employees. In addition to ripping or tearing, the disposable coveralls can burn or melt if they come into contact with flame or a sufficiently hot surface. They also cause heat stress for the employees that the cloth coveralls do not. In addition, the changes in procedures have eliminated the private lockers that were formerly available to the employees and reduced the amount of time, as well as the facilities, that are available for clean up. Thus, the changes had a significant and substantial adverse impact on Shop 57 employees. (5) There is no evidence that a return to status quo ante would seriously disrupt or impair the efficiency of the agency's operation. The 90-day study began on October 18 and by the time of the hearing on April 21, 1983 should have been completed. In any event, whether completed or not, those facts were in the Respondent's possession as of the hearing date but Respondent provided no evidence that reverting back to cloth coveralls would cause any difficulties for the Respondent. Allowing the employees to use the locker rooms, be issued their timecards and coveralls at the Pad Shop would not seriously disrupt the mission of the Shipyard. Taken as a whole, it is clear that a return to the status quo ante would not cause a major disruption in government operations in this case.

Having found that Respondent has violated Section 7116(a)(1) and (5) by the conduct described above, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby ordered that the Long Beach Naval Shipyard, Long Beach, California, shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in policy or procedures in Shop 57 involving the type of coveralls used in connection with fibrous glass operations and

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involving the procedures associated with the use of cloth coveralls without affording the Federal Employees Metal Trades Council, the exclusive representative of certain of our employees, hereinafter called FEMTC, reasonable notice and opportunity to negotiate concerning such policy and procedural changes.

(b) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Rescind the memorandum dated October 13, 1982, concerning the use of disposable coveralls, and restore the policy and procedures in effect prior thereto including the use of Shop 57 lockers and shower facilities on duty time, and the use of cloth coveralls.

(b) Notify and, upon request, negotiate with FEMTC regarding any intended changes in policy or procedures involving the use of coveralls in connection with fibrous glass operations.

(c) Post at the Long Beach Naval Shipyard, Long Beach, California, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer at said activity and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken by the Commander to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 8, Federal Labor Relations Authority, in

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writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Francis E. Dowd

FRANCIS E. DOWD
Administrative Law Judge

Dated: September 8, 1983
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in policy or procedures in Shop 57 involving the type of coveralls used in connection with fibrous glass operations and involving the procedures associated with the use of cloth coveralls without affording the Federal Employees Metal Trades Council, the exclusive representative of certain of our employees, hereinafter called FEMTC, reasonable notice and opportunity to negotiate concerning such policy and procedural changes.

WE WILL rescind the memorandum dated October 13, 1982, concerning the use of disposable coveralls, and restore the policy and procedures in effect prior thereto including the use of Shop 57 lockers and shower facilities on duty time, and the use of cloth coveralls.

WE WILL notify and, upon request, negotiate with FEMTC regarding any intended changes in policy or procedures involving the use of coveralls in connection with fibrous glass operations.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce any employees in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

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This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 and whose telephone number is (213) 688-3805

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 91

Union

and

Case No. O-NG-650

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues relating to the negotiability of two Union proposals[1/].

Union Proposal 1

> Inasmuch as a fair and objective evaluation depends upon the proper execution of the duties and responsibilities of the supervisor, at such time an employee is entitled to grieve or appeal evaluations (such as Form 211 evaluations or reports of conference visitations) the employee and his or/her representative may receive, to the extent permitted by 5 USC 7114(b)(4), upon request copies of the periodic evaluations of the supervisor completed within the immediate past eighteen (18) months referred to in Section A6 of R.C. Memorandum 8(24)-5,

1/ The Agency's request that the petition for review should be dismissed as untimely filed is denied. The Agency claims that the proposals in the instant case are substantially identical to proposals which were the subject of an earlier allegation by the Agency in response to the Union's request. However, contrary to the Agency's claim, the Authority finds the petition for review herein was timely filed under section 2424.3 of the Authority's Rules based upon the Agency's response to the Union's request for an allegation as to substantively revised proposals.

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June 3, 1977, said memorandum's Section A6 reading in pertinent part: "This Memorandum establishes procedures for the monitoring and review of the case management of Appellate work units submitted by appeals officers in the Southwest Region. These procedures provide for: * * * * * 6. Periodic evaluation by Assistant Regional Commissioner (Appellate) [now titled Regional Director of Appeals] of the review activities and practices in each Appellate Office to assure adequate managerial involvement.

Union Proposal 1 would essentially require the Agency to provide an employee and the Union with copies of a supervisor's periodic evaluations. The Union asserts that information concerning whether a supervisor adequately performed his/her supervisory duties would assist an employee in a grievance or appeal proceeding. However, the Authority has consistently held that matters pertaining to the appraisal of supervisors, as are at issue herein, are outside the duty to bargain because such matters do not concern the conditions of employment of bargaining unit employees. See Supplemental Decision on Remand, National Treasury Employees Union and Department of Health and Human Services, Region 10, 13 FLRA 732, 734 (1983), appeal docketed sub nom. National Treasury Employees Union v. FLRA, No. 84-7034 (9th Cir. Jan. 16, 1984); American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 504 (1980); National Association of Government Employees, Local R7-23 and Headquarters, 375th Air Base Group, Scott Air Force Base (MAC), Illinois, 7 FLRA 736 (1982). Thus, Union Proposal 1 does not concern conditions of employment and, hence, is outside the duty to bargain.

While the Authority finds no obligation to negotiate over the instant proposal, this decision does not prohibit a union from obtaining information concerning supervisory appraisals when appropriate. To the extent a union may be entitled to information as is sought under the proposal, such entitlement arises out of and is subject to the limitations of section 7114(b)(4) of the Statute.2/ Entitlements under

2/ Section 7114(b)(4) provides:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

. . . . . .

(Continued)

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section 7114(b)(4) for information which would enable a union to effectively carry out its representational obligation in connection with the processing of a grievance are determined on a case-by-case basis. See, e.g., United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio and National Federation of Federal Employees, Local 801, 16 FLRA No. 15 (1984), and cases cited therein. The Authority does not reach the question of a union's right to obtain data under the circumstances presented pursuant to section 7114(b)(4).

Union Proposal 2

> Appeals Officers will be informed of the amount of time used by the supervisor(s) in reviewing all (or parts of) work units and drafting the resulting negative evaluation.

Union Proposal 2 is outside the duty to bargain because it interferes with management's right under section 7106(a)(2)(B) of the Statute to assign work.3/ Union Proposal 2, by requiring an accounting

(Continued)

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

3/ Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

(B) to assign work . . . [.]

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of the amount of time spent by the supervisor in drafting a negative evaluation, effectively would require a supervisor to create and maintain a record of the time spent on all evaluations prepared by the supervisor. Consequently, the proposal prescribes the assignment of certain duties to particular employees, thereby conflicting with section 7106(a)(2)(B) of the Statute. See American Federation of Government Employees, Local 1822, AFL-CIO and Veterans Administration Medical Center, Waco, Texas, 9 FLRA 709 (1982); American Federation of State, County and Municipal Employees, AFL-CIO, Local 2910 and Library of Congress, 11 FLRA 632 (1983) (Union Proposal 4).

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS HEREBY ORDERED that the petition for review as to Union Proposals 1 and 2 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3488

Union

and

Case No. O-NG-703

FEDERAL DEPOSIT INSURANCE
CORPORATION,
NEW YORK REGION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues relating to the negotiability of two Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

> Employees who are assigned to Puerto Rico or the Virgin Islands for periods in excess of three weeks will be allowed to return to their residence every second weekend. Employees will be permitted to depart from their temporary assignment at a sufficient time to allow arrival at their residence by 6:00 p.m. on the same day and depart their residence no sooner than 7:00 a.m. on the next business day following such weekend.

By its plain language, Union Proposal 1 requires the Agency to grant employees on temporary duty assignment in Puerto Rico or the Virgin Islands, on every other weekend, that amount of duty time, i.e., time which would otherwise be spent performing the work of their positions, for use in traveling to and returning from their place of residence. As the Agency indicated, depending on such variable factors as flight schedules and commuting time to and from points of departure and destination, the amount of duty time which would be "sufficient" to complete such travel, given the time limitations stated in the proposal,

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could amount to as much as an entire eight hour workday.1/ In any event, the effect of the proposal is to preclude the Agency from assigning work to employees during that portion of the workday which is required for travel.

In this regard, Union Proposal 1 herein has the same effect as Union Proposal 1 in American Federation of Government Employees, AFL-CIO, Local 3424 and Federal Home Loan Bank Board, San Francisco, California, 14 FLRA 79 (1984). In that case, the proposal at issue required the agency to grant a maximum of three hours of duty time for traveling, each way, when employees on temporary duty assignment returned to their residences on the weekends. The Authority held, based on its decisions in American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA 446 (1983) and National Treasury Employees Union and NTEU Chapter 80 and Department of the Treasury, Internal Revenue Service, Central Region, 8 FLRA 197 (1982), that because the proposal would preclude the assignment of work to employees during the duty time on which they were traveling to their residences, or returning to their temporary duty assignments, it directly interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute.2/ Thus, as Union Proposal 1 at issue herein similarly would preclude the Agency from assigning work to employees during that portion of the workday which they are using for travel to and from their residences, for the reasons set forth in the FHLBB, San Francisco, FHLBB, New York District Office, and IRS, Central Region decisions, it directly interferes with management's right to assign work

1/ Agency Brief at 4-5. The Union tacitly admits to this interpretation of the proposal when it argues that a "sufficient" amount of time is whatever amount of duty time is necessary to allow employees to reach their destinations given the time limitation in the proposal. Union Brief at 5.

2/ Section 7106(a)(2)(B) provides, in relevant part:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(B) to assign work[.]

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under section 7106(a)(2)(B) and is outside the Agency's duty to bargain.3/

Union Proposal 2

> The Union has the right to participate at any stage in the ranking process and specifically to have a representative on the ranking panel. Transportation expenses incurred to enable a Union representative to participate on a ranking panel will be borne by the employer.

Based on the express language of the proposal, and in the absence of any persuasive evidence of contrary intent in the record, the Authority interprets the proposal as requiring Union participation in every phase of the process whereby management selects an individual to fill a vacant position, exclusive of the decision to select itself. Under applicable regulation,4/ this process involves, among other things, analysis of the job to be filled to determine the knowledges, skills, and abilities needed to successfully perform the duties of the position, i.e., identification of selective factors; the development of criteria used to determine whether, and the extent to which, candidates possess those knowledges, skills, and abilities, i.e., a crediting plan; the rating of candidates, i.e., the application of the crediting plan or rating schedule to the information contained in candidate applications to determine each candidate's "score" or degree of qualification; ranking the candidates by their "scores"; and preparing a certificate listing the candidates by ranking for submission to the selecting official.5/

3/ Both parties argue as to the compelling need for an Agency regulation, FDIC General Travel Regulation, paragraph 1208(c), which provides that employees on temporary duty assignments outside the continental United States may be authorized to return to their residences on every third weekend and will be authorized up to eight hours of official time for purposes of such travel. However, in light of its decision, the Authority finds it unnecessary to address the compelling need for the cited regulation. Such an agency regulatory provision constitutes an exercise of management's authority to assign work under section 7106(a)(2)(B) of the Statute and, therefore, is not subject to negotiation. American Federation of Government Employees, AFL-CIO, Local 1603 and Navy Exchange, Naval Air Station, Patuxent River, Maryland, 9 FLRA 1039, 1040 (1982).

4/ See Federal Personnel Manual Supplement 335-1, Appendix B.

5/ See also National Treasury Employees Union and NTEU Chapters 153, 161 and 183 and U.S. Customs Service, Region II, 11 FLRA 209 (1983), enforcement denied sub nom. U.S. Customs Service, Region II v. Federal Labor Relations Authority, 739 F.2d 829 (2nd Cir. 1984).

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In this regard, in providing for the Union to participate, among other things, in that stage of the evaluative process which involves the identification of the "selective factors" to be used in rating and ranking candidates for a position, Union Proposal 2 herein has the same effect as Union Proposals 1 and 2 in National Federation of Federal Employees, Local 1497 and Headquarters, Lowry Technical Training Center (ATC), Lowry Air Force Base, Colorado, 11 FLRA 565 (1983). The proposals at issue in that case provided for a joint labor-management committee to develop "promotion evaluation patterns," which included both "selective factors" and "crediting plans." Relying on its decisions in National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981), enforced sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982), National Federation of Federal Employees, Local 1431 and Veterans Administration Medical Center, East Orange, New Jersey, 9 FLRA 998 (1982), and American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 613 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. American Federation of Government Employees v. Federal Labor Relations Authority, 455 U.S. 945 (1982), the Authority held that those proposals, by providing for union participation in the decision-making process whereby management determines the knowledges, skills, and abilities which are necessary for successful performance of the work of a position, would directly interfere with management's right to make selections for appointments to vacant positions under section 7106(a)(2)(C) of the Statute.6/ As indicated above, Union Proposal 2

6/ Section 7106(a)(2)(C) provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source[.]

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at issue in this case similarly would require Union participation in that stage of the process of evaluation of candidates, prior to selection, wherein management determines the requisite "selective factors" to be used in rating and ranking candidates for the vacant position. Thus, apart from other considerations and for the reasons set forth in the Lowry Air Force Base decision, and the cases cited therein, Union Proposal 2 herein directly interferes with management's rights under section 7106(a)(2)(C) of the Statute and is outside the duty to bargain. Cf. National Federation of Federal Employees, Local 1001 and Department of the Air Force, Vandenberg Air Force Base, California, 15 FLRA No. 154 (1984) (Provisions 2 and 3) (provisions providing for union representative on selection panels to participate both in the deliberations and discussions attendant upon the decision to select a particular candidate and in the decision to select itself nonnegotiable under section 7106(a)(2)(C)).

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Union Proposals 1 and 2 be, and it hereby is, dismissed.7/

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

7/ In light of its decision herein, the Authority finds it unnecessary to address the Agency's additional contentions as to the nonnegotiability of the proposals.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 1923

Union

and

Case No. O-NG-865

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE,
MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises an issue concerning the negotiability of one Union proposal.1/ Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.2/

1/ In its Reply Brief, the Union withdrew its request for a negotiability determination on three other proposals. Hence these proposals are not considered here.

2/ The Agency's contention that the Union's petition for review should be dismissed as being untimely filed cannot be sustained. It is well established that a union is not required to file a petition for review in response to an unsolicited allegation of nonnegotiability. American Federation of Government Employees, AFL-CIO, Local 3385 and Federal Home Loan Bank Board, District 7, Chicago, Illinois, 7 FLRA 398 (1981) at 400-401. Furthermore, a union may file a petition for review in response to an allegation of nonnegotiability made by an agency in the context of a Federal Service Impasses Panel (Panel) proceeding. International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA 198 (1982). The record in this case indicates that the Union did

(Continued)

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Union Proposal

> Only under unusual circumstances where offering an employee time off for religious observance would severely disrupt the agency's function, will the accommodation be denied.

This proposal would expressly require the Agency to grant an employee's request for religious compensatory time unless doing so "would severely disrupt the agency's function." The Authority concludes, in agreement with the Agency, that the disputed proposal is inconsistent with a Government-wide regulation governing the granting of compensatory time for religious observances. Specifically, the Office of Personnel Management (OPM) has promulgated 5 CFR 550.1002 (1984) in order to implement the requirement in 5 U.S.C. § 5550a that OPM prescribe regulations setting out the circumstances when employees may be entitled to compensatory time for religious observances.3/ 5 CFR 550.1002 provides in relevant part as follows:

> § 550.1002 Compensatory time off for religious observances
>
> . . . . . .
>
> (b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

(Continued)

not file a petition for review in response to an unsolicited allegation of nonnegotiability. Instead, the Union filed a petition for review within 15 days of service upon it of an allegation of nonnegotiability made in the Agency's response to the Union's request for Panel consideration of an impasse. The Union's petition is therefore timely.

3/ The Authority concludes that the cited OPM regulation is a Government-wide regulation within the meaning of section 7117(a)(1) because it applies to the Federal civilian workforce as a whole. See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980).

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The standard set out in the proposal for denying an employee's request for compensatory time for religous observances, namely, "only under unusual circumstances which would severely disrupt the agency's function" is clearly more restrictive than the standard established by 5 CFR 500.1002 which is "[interference] with the efficient accomplishment of the agency's mission." Thus, the Union proposal conflicts with the OPM regulation and is outside the duty to bargain pursuant to section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Union

and

Case No. O-NG-932

DEPARTMENT OF THE ARMY
AND THE AIR FORCE,
NATIONAL GUARD BUREAU

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Federal Labor Relations Authority (Authority) pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of a single Union proposal. Upon careful consideration of the record as a whole, including the parties' contentions, the Authority makes the following determinations.

Union Proposal

> Technicians applying for promotion under the Merit Promotion Plan to positions in support activities which are not mobilization entities will be considered eligible for that promotion regardless of the compatibility requirement.

The National Guard Technicians Act of 1968 (32 U.S.C. § 709(b))[1/] mandates that civilian technicians maintain military membership in the

1/ 32 U.S.C. § 709(b) states:

§ 709. Technicians: employment, use, status

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

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National Guard and hold the military grade specified for their civilian position. The National Guard Bureau regulations implementing this statutory provision (TPR 300 (302.7), paragraph 7-9) detail the manner in which civilian technicians will comply with the statute's requirements by maintaining military membership in the Guard and, in particular, compatible civilian and military job designations.

The Union proposal herein would require the Agency to consider technicians for promotions in nonmobilization units without regard to "compatibility" requirements. That is, under this proposal a technician could be promoted to a position in a nonmobilization unit regardless of whether he possessed the equivalent military status for that position. In this respect, it is clear that the Union proposal conflicts with the cited Agency regulations. Thus, whereas the compatibility requirement applies to all technicians whether or not in mobilization units, the Union proposal seeks to carve out an exception for technicians who apply for promotion to positions in nonmobilization units.

Therefore, the issue before the Authority is whether, under section 7117(a)(2)2/ of the Statute, there is a compelling need for the regulation so as to bar negotiation on the conflicting Union proposal. The Agency argues3/ that its regulation meets the compelling need criterion in the Authority's Rules and Regulations at section 2424.11 (c).4/ That criterion provides that a compelling need exists for an

---

2/ Section 7117(a)(2) of the Statute reads:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

. . . . . .

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

3/ Agency Statement of Position at 5.

4/ Section 2424.11(c) of the Authority's Rules and Regulations states:

§ 2424. Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency

(Continued)

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agency regulation to bar negotiation on a conflicting union proposal when the regulation in question implements, in an "essentially non-discretionary" manner, a mandate directed toward the agency by law or outside authority.

The National Guard Technicians Act clearly mandates that civilian technicians hold compatible military positions. Moreover, that statute does not establish an exception for nonmobilization units. Thus, the National Guard Bureau regulation at issue herein, by requiring compatibility with regard to positions in nonmobilization units, implements in a nondiscretionary manner the mandate of the statute. As such, a compelling need exists under section 2424.11(c) of the Authority's Rules and Regulations for the instant Agency regulations. See Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 11 FLRA 505 (1983) (Union Proposal 4), aff'd in part and rev'd and remanded in part sub nom. Association of Civilian Technicians, Montana Air Chapter v. Federal Labor Relations Authority, No. 83-1489 (D.C. Cir. Mar. 8, 1985); American Federation of Government Employees, AFL-CIO, Local 2953 and State of Nebraska, Military Department, Office of the Adjutant General, Lincoln, Nebraska, 7 FLRA 712 (1982) (Union Proposal IV), rev'd in other respects sub nom. State of Nebraska, Military Department, Office of Adjutant General v. Federal Labor Relations Authority, 705 F.2d 945 (8th Cir. 1983); American Federation of Government Employees, AFL-CIO, Local 2953 and National Guard Bureau, Office of the Adjutant General, Nebraska, 7 FLRA 87 (1981) aff'd sub nom. American Federation of Government Employees, AFL-CIO, Local 2953 v. Federal Labor Relations Authority, 730 F.2d 1534 (D.C. Cir. 1984); Association of Civilian Technicians, Pennsylvania State Council and The Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania, 3 FLRA 50 (1980). Cf. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, Topeka, Kansas, 15 FLRA No. 11 (1984) (proposal for six month grace period to allow reassignment to compatible military position is outside duty to bargain in that military aspects of technicians are totally mandated by law).

(Continued)

> demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> . . . . . .
>
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

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Thus, for the foregoing reasons, the Authority concludes that the Union's proposal is barred from negotiation by an Agency regulation for which a compelling need exists under section 7117(a)(2) of the Statute.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review in this matter be, and it hereby is, dismissed.5/

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ In light of the Authority's disposition in this case it is not necessary to address the other arguments proffered by the Agency.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 12, AFL-CIO

Union

and

Case No. O-NG-940

DEPARTMENT OF LABOR

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of the following two Union proposals.

Union Proposal 1

EMPLOYEE HANDBOOK

[T]he Union . . . proposes a joint committee be formed to meet separate from the Mid Term Bargaining forum to discuss the Union's objections to the proposed Employee Handbook with the goal of accepting the new handbook if the Union's concerns are satisfactorily addressed.

Union Proposal 2

UPWARD MOBILITY AND TRAINING

Change point 6 on page 6 to read as follows:

Panels will use individual oral interviews as part of the Merit Staffing evaluation process in order to make a final determination on the employees to be certified.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Based on the record in this case it appears that the Union submitted these proposals to the Agency pursuant to the parties' agreement in response to the Agency's issuance of a revised "Employee Handbook" and

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the "reissuance" of the Upward Mobility Training Agreement. When the Agency refused to negotiate on the proposals, the Union requested an allegation of nonnegotiability and the Agency replied that it had no duty to bargain on the matters proposed. The Agency's position is that these matters are not properly before the Authority because the Department of Labor has made no material change affecting conditions of employment and no duty to bargain exists with regard to these proposals under such circumstances. The Agency did not assert that the two proposals were nonnegotiable, but, rather, that there is no duty on the Agency's part to bargain over these proposals. The Union thereupon filed the instant appeal with the Authority seeking a negotiability determination.

The Agency has not alleged or demonstrated in the record herein that these proposals are inconsistent with law or regulation, and since no basis for finding the proposals nonnegotiable is otherwise apparent, the Authority finds that Union Proposals 1 and 2 are within the Agency's duty to bargain under the Statute. It is well established that the parties bear the burden for creating a record upon which the Authority can make its decision. See National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886, 891 (D.C. Cir. 1982), aff'g National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981). See also American Federation of State, County and Municipal Employees, Local 2477 and Library of Congress, 14 FLRA 59 (1984).

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the disputed proposals.*/

Issued, Washington, D.C., April 15, 1987

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ The Authority decides herein only the negotiability of Union Proposals 1 and 2 under the Statute. To the extent that there are factual issues in dispute between the parties regarding the duty to bargain in the specific circumstances of this case, these issues may be raised and litigated in an unfair labor practice proceeding. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245

Union

and

Case No. 0-NG-1108

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition filed by the Union for review of an alleged negotiability dispute with the Activity. For the reasons stated below, the Union's petition for review must be dismissed.

It appears from the Union's submissions that it sought an answer from the Activity to the question whether any pay increase over the amount set by Executive Order or Act of Congress is not subject to negotiations or to the parties' negotiated grievance and arbitration procedure. The Activity's response was that any wage adjustment is limited by the terms and conditions of any applicable law or Executive Order in effect at the time the adjustment is negotiated or effective. Treating that response as the Activity's allegation of nonnegotiability, the Union filed the petition for review in this case.

Section 2424.1 of the Authority's Rules and Regulations, which implements section 7117 of the Statute, provides, in pertinent part:

> § 2424.1 Conditions governing review
>
> The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117(b) and (c), namely: If an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority[.]

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Further, it is well-established that a petition for review of a negotiability issue which does not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision thereon does not meet the conditions for review set forth in section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations. See, e.g., Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, 2 FLRA 314 (1979).

Thus, the conditions governing review of a negotiability issue include a requirement that there be "a matter proposed to be bargained," and that the proposal must be specific in form and content so as to enable the Authority to determine whether the proposal is negotiable under the Statute. See, e.g., Federal Employees Metal Trades Council and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 10 FLRA 407 (1982).

It has been determined that the circumstances here involved do not give rise at this time to a ripe negotiability dispute upon which the Authority can rule. In this case, the dispute between the parties is not sufficiently delineated to form a basis for a negotiability determination by the Authority. As described above, while the Union may have sought to negotiate with the Activity concerning wage adjustments in excess of the Federal wage cap, it did not propose any specific language for negotiation. Therefore, it is clear that the Union's petition for review was prematurely filed and does not meet the conditions for review set forth in section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations and must be dismissed on that basis. Moreover, to decide the issue presented in the instant case under the circumstances described would be tantamount to issuing an advisory opinion, which is precluded by section 2429.10 of the Authority's Rules and Regulations.

Accordingly, and apart from other considerations, the Union's petition for review is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 15, 1985

Harold D. Kessler,
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3231

Union

and

Case No. O-NG-687

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues relating to the negotiability of the following proposal:

> Upon request all employees in Area IV will be granted paid time without charge to leave, up to 5 minutes before and up to 5 minutes after the lunch period, for the purpose of preparation and cleanup.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination. The record indicates that the instant appeal arose as a result of negotiations pursuant to the Agency's decision to terminate a practice of permitting employees in Area IV to take 45 minute rather than 30 minute lunch periods without a corresponding 15 minute extension of the workday.

The Agency contends that the proposal which would attach a 10 minute paid break period to the 30 minute unpaid lunch period is nonnegotiable because it conflicts with 5 U.S.C. §6101*/ as interpreted in

*/ 5 U.S.C. §6101 provides in pertinent part as follows:

(Continued)

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Comptroller General decision B-190011, December 30, 1977. The Union argues that notwithstanding the statutory requirements regarding paid breaks, the proposal would merely require the Agency to exercise its authority under 5 U.S.C. §6101(a)(3)(F) to grant paid breaks in working hours of up to one hour and thus to append a 10 minute paid break period to an unpaid lunch break.

The Authority finds in agreement with the Agency that the proposal is inconsistent with law as interpreted by the Comptroller General. In the

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(Continued)

. . . . . .

(2) The head of each Executive agency, military department, and of the government of the District of Columbia shall--

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that cost would be substantially increased, he shall provide, with respect to each employee in his organization, that--

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

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cited decision, the Comptroller General ruled that under 5 U.S.C. §6101 an authorized rest period during which an employee is in a paid status cannot be granted for the purpose of extending the lunch period. Thus, contrary to the Union's argument, a paid break which is part of the workday cannot be appended to the unpaid lunch period under law.

With regard to the other Union argument that the proposal is negotiable since it in effect reestablishes a past practice, the Authority concludes that this argument is irrelevant because the practice is illegal. The Authority concludes therefore that the Union proposal violates law and is therefore outside the duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 17, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1698

Union

and

Case No. O-NG-693

DEPARTMENT OF THE NAVY,
AVIATION SUPPLY OFFICE,
CONSOLIDATED CIVILIAN PERSONNEL DIVISION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents an issue concerning the negotiability of the following Union proposal.

Union Proposal

ARTICLE IX
OFFICIAL TIME

Section 6.b: The grant of official time to Union Officers, other than the President of AFGE, Local 1698, and Stewards shall be limited to representational efforts on behalf of employees within the bargaining unit described in Article I, Section 2 of this agreement. With the exception of the AFGE, Local 1698 President, no official time will be granted to permit any representation, labor management relations, or collective bargaining efforts undertaken on behalf of any other bargaining unit or bargaining unit employees. Official time shall not be granted to permit attention to any internal Union business.

Section 6.c: The grant of official time set forth in Section 6.a. above shall also apply to the AFGE, Local 1698 President with respect to labor management and

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representation activities at other Activities on the ASO Compound for which AFGE Local 1698 is the exclusive bargaining representative.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination. The record indicates that the Union herein is the exclusive representative of four separate bargaining units located on the Philadelphia Aviation Supply Office (ASO) compound. In addition to the ASO, the other bargaining units are: the Naval Publications and Forms Center, the Navy International Logistics Control Office and the Naval Air Technical Services Facility. The Union's president is employed in the ASO bargaining unit. The proposal seeks to authorize official time for the Union president to conduct collective bargaining and representational functions within the ASO bargaining unit and also in the three other bargaining units represented by the Union on the compound.

The Union asserts that bargaining on its proposal is authorized under section 7131(a) of the Statute[1/] because that section "also entitles the exclusive representative of the bargaining unit to official time for negotiations, whether or not that 'employee' is a 'unit employee'."[2/] A position similar to the Union's herein was put forward by the General Counsel in United States Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio and Wright-Patterson AFB Fire Fighters Local F-88, International Association of Fire Fighters, AFL-CIO, 7 FLRA 738 (1982). The Authority found, however, that no obligation to bargain pursuant to section 7131(a) of the Statute arises when a proposal seeks official time for persons outside the bargaining unit for which a new collective bargaining agreement is to be negotiated. Hence, based on 2750th Air Base Wing Headquarters and the reasons stated therein, the disputed proposal herein is not within the duty to bargain under section 7131(a) of the Statute. See also National Weather Service

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1/Section 7131(a) provides:

§7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

2/ Union Reply Brief at 4-5.

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Employees Organization and National Oceanic and Atmospheric Administration, 15 FLRA No. 8 (1984).

The Union also contends that its proposal is negotiable because, in its view, section 7131(d)(1) of the Statute[3/] "was intended to authorize negotiations over official time for the employee designated by the union as its official representative, whether or not he or she was a 'unit employee'."[4/] However, in Department of the Navy, Naval Construction Battalion Center, Port Hueneme, California and National Association of Government Employees, Local R12-29, 14 FLRA No. 60 (1984), the Authority determined that no bargaining obligation arose pursuant to section 7131(d) of the Statute in circumstances identical to those herein. Hence, based on Port Hueneme, and the reasons and cases cited therein, section 7131(d) does not authorize bargaining on the disputed proposal.[5/]

Finally, the Union contends that section 7135(a)(1)[6/] of the Statute permits the "grandfathering" of the prior contractual official time

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3/ Section 7131(d)(1) provides, in pertinent part:

> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative,
>
> . . . . . .
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

4/ Union Reply Brief at 4.

5/ American Federation of Government Employees, AFL-CIO and U.S. Environmental Protection Agency, 15 FLRA No. 96 (1984)(Union Proposal 2) contains a discussion of the meaning and purpose of section 7131(d) of the Statute.

6/ Section 7135(a)(1) provides:

> §7135. Continuation of existing laws, recognitions, agreements, and procedures
>
> (a) Nothing contained in this chapter shall preclude--
>
> (1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter.

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agreement, authorizing official time for Union officials to conduct negotiations on behalf of other bargaining units, into any new collective bargaining agreement, or at least obligates management to negotiate over its continuance. Assuming, without deciding that such a provision was lawful prior to the effective date of the Statute, section 7135(a)(1), nevertheless, does not obligate the Agency either to negotiate over, or continue the prior provision in any new agreement. The operative effect of section 7135(a)(1) was examined by the Authority in Interpretation and Guidance, 2 FLRA 265, 271 (1979). The Authority concluded that the section permitted the parties to mutually agree to renew or to continue lawful provisions negotiated prior to the effective date of the Statute, even if in conflict with Statutory requirements. However, an objection by either party to the continuance or renewal of such provisions prevents the continuance or renewal of the provisions pursuant to section 7135(a)(1). Turning to the instant dispute, the proposal, as set forth above, has been found to conflict with section 7131(a) and (d)(1) of the Statute and the ASO has refused to bargain on it. Consequently, the proposal is outside the ASO's duty to bargain, even in circumstances where agreement on the same or similar proposal had been reached prior to the Statute's effective date.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 17, 1985

Henry B Frazer III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY ADMINISTRATION,
KANSAS CITY, MISSOURI

Activity

and

Case No. 0-AR-866

NATIONAL TREASURY EMPLOYEES UNION

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Merton C. Bernstein filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter arose when the reviewing official, the second level supervisor, lowered the performance appraisals given to the grievants by the evaluating official, their first level supervisor. A grievance was filed which alleged that provisions of the parties' collective bargaining agreement dealing with performance appraisals had been violated. As his award, the Arbitrator ruled, in pertinent part, that under the parties' agreement the reviewing official lacked authority to lower performance appraisals and ordered that the appraisals be adjusted accordingly.1/

As one of its exceptions, the Activity contends that this aspect of the award is contrary to section 7106(a)(2)(B) of the Statute. The Authority agrees.

1/ Although the parties stipulated four issues to the Arbitrator, the Activity excepts only to the Arbitrator's ruling on the reviewing official's authority to lower performance appraisals. Thus, it is not necessary to address the other issues.

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The Authority has consistently found any union proposal which prescribes specific duties to be performed by particular non-bargaining unit personnel in the agency to be outside the duty to bargain since it would directly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute by eliminating the discretion inherent in that right. E.g., American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 14 FLRA 278 (1984), appeal docketed sub nom. Local 32, American Federation of Government Employees v. Federal Labor Relations Authority, No. 84-1251 (D.C. Cir. June 15, 1984). In that regard, it is well-established that an arbitrator's award may not interpret or enforce a provision of a collective bargaining agreement so as to deny the authority of an agency to exercise its rights under section 7106(a) of the Statute, e.g., American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70, 79 (1981) (Union Proposal 4), aff'd sub nom. American Federation of Government Employees, AFL-CIO, Local 1968 v. Federal Labor Relations Authority, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 2085 (1983), or result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights, e.g., Veterans Administration Hospital, Lebanon, Pennsylvania and American Federation of Government Employees, AFL-CIO, Local 1966, 11 FLRA 193 (1983).

In the terms of this case, the Arbitrator interpreted the parties' collective bargaining agreement so as to preclude the reviewing official, a non-bargaining unit employee, from lowering the employees' performance appraisals. That aspect of the Arbitrator's award therefore improperly limits and directly interferes with management's right under section 7106(a)(2)(B) to assign performance appraisal review duties to the reviewing official by eliminating the discretion inherent in that right and by the Arbitrator having substituted his judgment for that of the Activity in exercising such right. Consequently, that aspect of the award is contrary to section 7106(a)(2)(B) of the Statute.

Accordingly, the disputed aspect of the Arbitrator's award is set aside.2/

Issued, Washington, D.C., April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this decision, it is not necessary to address the Activity's other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, 440TH TACTICAL
AIRLIFT WING (AFRES)
MILWAUKEE, WISCONSIN

Respondent

and

Case No. 5-CA-30148

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2144, AFL-CIO AND
HERBERT E. MUELLER

Charging Parties

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Judge's Decision and briefs in support thereof, and the Respondent filed an opposition to the General Counsel's exceptions and a supporting brief.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

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ORDER

IT IS ORDERED that the complaint in Case No. 5-CA-30148 be, and it hereby is, dismissed.

Issued, Washington, D.C. April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF THE AIR FORCE HEADQUARTERS, 440th TACTICAL AIRLIFT WING (AFRES) MILWAUKEE, WISCONSIN Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2144, AFL-CIO, and HERBERT E. MUELLER Charging Parties	Case No. 5-CA-30148

Major Wade B. Morrison,
Counsel for Respondent

Judith Ramey,
Counsel for the General Counsel
Federal Labor Relations Authority

Kevin M. Grile,
Counsel for the Charging Party

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978. Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. 7101 et seq. (Supp. V, 1981), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the "Statute", and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

On January 18, 1983, the Charging Parties filed an unfair labor practice charge against Respondent. The General Counsel of the Federal

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Labor Relations Authority ("Authority") investigated the charge and, on March 29, 1983, filed the complaint initiating this proceeding.

The complaint alleges violations of 5 U.S.C. 7116(a)(1) and (2).[1/] The alleged violative act is the termination of an employee, Herbert E. Mueller, because he engaged in informational picketing and presented grievances to management, on behalf of and through Local 2144 of the American Federation of Government Employees ("Union"). Respondent admits terminating Mr. Mueller and claims that it was because of his duty performance, not his union activities.

The case was heard on May 25, 26 and 27, 1983, in Milwaukee, Wisconsin. Witnesses were sequestered, except for Mr. Mueller, assisting the General Counsel, and Raymond True, assisting Respondent. These exceptions were by agreement of the parties. The parties appeared, adduced evidence, and examined witnesses. Pursuant to an order dated June 17, 1983, briefing time was extended to July 25. On July 25, briefs were submitted by all the parties.

Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

Findings of Fact[2/]

1. It is admitted that the American Federation of Government Employees ("AFGE"), Local 2144 has been the exclusive representative of a

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1/ Section 7116 provides, in pertinent part, that:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [or]
>
> (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. . . .

2/ The following abbreviations will be used. "1 TR" refers to the transcript of May 25. "2 TR" refers to the transcript of May 26. "3 TR" (Continued)

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unit of Respondent's employees, including all General Schedule and Wage Board civilians, during all times material to this proceeding. Professional, managerial and supervisory employees were excluded from the unit, at the times here relevant. Herbert E. Mueller was a member of the bargaining unit during his employment and, on August 14 became a union member.

2. On November 24, Mr. Mueller was terminated.

3. Mr. Mueller was initially hired by Respondent as a temporary laborer, WG7, in September 1981. In the latter part of November 1981, he was selected by Michael Bratlein to be a civil engineering technician in the Civil Engineering Division ("CE") to perform work as a planner of construction projects. Mr. Bratlein is a supervisory engineer and serves as Deputy Base Engineer. At the time of his selection as a planner, Mr. Mueller began serving a probationary period of 1 year. According to Mr. Bratlein, a probationary period is to allow management to answer the "basic question" -- "would you like to retain this person forever" (2 TR 349).

4. When hired as a planner, Mr. Mueller's first-line supervisor was Roland Kolwitz. His second-line supervisor was Bernhart Schmidt, who had been a union steward at one time, and was Operations Foreman in CE during Mr. Mueller's employment. His third-line supervisor was Raymond True who, as Base Engineer, is the chief officer in CE and also a Colonel in the Reserves. On July 26, Mr. Kolwitz was replaced by Thomas Bausano, serving on a temporary detail. Mr. Bausano supervised Mr. Mueller from July 26 until November 24.

5. For the period from September 24, 1981 to March 31, 1982, Mr. Mueller received a Civilian Potential Appraisal ("CPA"). It was dated April 23 and signed by Mr. Kolwitz, as supervisor, and by Mr. Schmidt as the reviewing official. The ratings were mostly in the "Average" range (GC 3). Some were in the "[s]lightly above average" range (GC 3). Mr. Mueller felt that the appraisal was not high enough

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(Continued)
refers to the transcript of May 27. "AE" refers to the exhibits of the Respondent, and "GC" refers to those of the General Counsel. Multipage exhibits will be referenced by exhibit number followed by page or paragraph number. "GCBr" refers to the brief of the General Counsel, "CPBr" to that of the Charging Parties, and "RBr" to that of the Respondent.

All dates referenced herein are in 1982, unless otherwise specified.

Corrections to the transcript have been made pursuant to 5 CFR § 2423.19(r) and appear in Appendix A hereto.

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and protested it to Mr. Schmidt and Colonel True. Both assured him that it was "good" (1 TR 18, 19). Colonel True gave him this assurance in May 1982, and also told him that it would not harm his being promoted into a supervisory position.

6. For the period from July 26 to September 20 Mr. Mueller received a "fully successful" overall performance rating in a written Job Performance Appraisal ("JPAS"). See GC 4. It is dated September 22 and shows signatures on that date by Mr. Bausano, as the "Supervisor," Mr. Schmidt, as the "Reviewing Official," and Mr. Mueller as the "Employee." A note at the end of the appraisal states: "This is a presumptive JPAS rating" (GC 4.4).

6a. A "presumptive" rating "may be assigned" when there is insufficient data upon which to evaluate an employee (AE 4). It is intended "neither to hurt the employee nor to glorify the employee," but means that there "was no proof that anything had occurred," and so a presumption is made that the employee is "passable or acceptable" (2 TR 137). It is to prevent an employee from sustaining "any undue hardship on an within-grade increase that is due, yet they have not had adequate time to be evaluated" (2 TR 226).

6b. The Office of Personnel advised Mr. Bausano that he had supervised Mr. Mueller for too short a time to write up a JPAS. Mr. Kolwitz had failed to make out a JPAS for Mr. Mueller before being replaced by Mr. Bausano. It was admitted that Mr. Schmidt, as the second-line supervisor, could have written up an actual appraisal, based upon his own observation of the performance of Mr. Mueller. Mr. Schmidt had daily contact with Mr. Mueller and "very often" reviewed his work (2 TR 284). Mr. Bratlein also admitted to having work-type contacts with Mr. Mueller, two or three times a week, and to having been personally involved in some "personality problems" of Mr. Mueller in dealing with some other agencies on the base (2 TR 332).

6c. Mr. Bausano admitted that, as of September 22, he considered that Mr. Mueller "had his high points and his low points just like anyone" and was not a "total loss" (2 TR 154). Mr. Schmidt considered Mr. Mueller to be "marginal on his performance," at the time the JPAS was signed (3 TR 122).

6d. A personnel specialist, Ronald Springer, advised giving the presumptive rating, and a consequent within-grade increase which was approved on September 17, 1982 and made effective on October 3, 1982.

7. At sometime after the time the within-grade increase had been granted, Mr. Springer met with Colonel True and Mr. Bausano, two times, about the procedure for terminating a probationary employee and, in particular, Mr. Mueller. Mr. Springer advised them of the proper reasons for termination, that it would have to be for "performance based" reasons, and that there had to be "documentation" (2 TR 239).

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8. Rumors about Mr. Mueller being fired surfaced in CE in October. A union official learned of them and discussed the matter with Mike Taylor, a personnel specialist in the Chicago office, and Colonel McMahon, Base Commander, in the middle of October. Neither professed any knowledge of Mr. Mueller's termination. Mr. Taylor checked, and called the union official back with word that "the rumor was not true" (2 TR 41-42). Mr. Bausano, about the same time, assured Mr. Mueller that the rumors were "unfounded" (1 TR 30).

9. On November 17, Mr. Mueller was informed, by a letter signed by Mr. Schmidt, that he was being terminated during probation.

10a. The primary decision to terminate Mr. Mueller had to be made by Mr. Schmidt, because Mr. Bausano was only on detail as his supervisor. Mr. Bausano approached Mr. Schmidt to discuss the subject and to get some "feedback" (2 TR 176). Mr. Bausano brought to Mr. Schmidt a "rough draft" of things he could remember, to justify a letter of termination, "to see if it was usable or if they were willing to do something else" (2 TR 176).

10b. The "idea" of terminating Mr. Mueller "floated around" throughout most of the time period of Mr. Bausano's supervision of him. Colonel True, Mr. Schmidt, Felix Mercado, Phillip Tojek, Mr. Bratlein, secretaries, the Contracting Officer and her assistant, and some laborers expressed negative thoughts to Mr. Bausano about Mr. Mueller. Mr. Mercado and Mr. Tojek were members of the bargaining unit, at the time.

10c. Perhaps as early as September, Colonel True discussed with Mr. Schmidt the problems with Mr. Mueller's performance and that "it might be necessary for [Mr. Schmidt] to take some action" (3 TR 68-71).

11. Three reasons for termination were given in the November 17 letter to Mr. Mueller, the first being for "[p]erformance" and the fact that "[s]everal instances of questionable ability had occurred since the change to the present supervisor [Mr. Bausano]" (GC 8.1).

11a. Mr. Bratlein, who was in contact with Mr. Mueller probably two or three times a week, admitted that Mr. Mueller made only "slightly more" mistakes than the seven other planners with whom Mr. Bratlein had worked, and that only one other had been removed involuntarily (2 TR 363). In Mr. Bratlein's opinion, Mr. Mueller "probably could accomplish the job if the personality wouldn't have gotten in the way, and it appears to have been really the biggest stumbling block for him" (2 TR 345).

11b. Sandra Skinner, a union steward and coworker of Mr. Mueller in the planning section, was in a position to compare the work of eight planners. (While she may have had some bias, as a union steward, she appeared to give honest, candid, and careful testimony -- all under the scrutiny of her third-line supervisor, Colonel True -- so I have credited

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her testimony). Ms. Skinner sees all work orders in CE; when there is a problem on one, it comes back to her desk; she keeps the status board on work orders; she attends regular Monday meetings where problems with projects are discussed; she knows if engineering performance standards are used; she can observe how often work orders are returned for reasons of material ordering; her desk is located so that she can overhear complaints made to Mr. Mueller and Mr. Bausano; "customers" (other agencies on the base for whom CE is doing work) call her "fairly often" to check on the progress of work orders (2 TR 100). On the basis of what she was in a position to know, observe, and overhear, Ms. Skinner ranked Mr. Mueller as the second best planner of the eight with whom she had worked. Only one other of the eight planners was terminated involuntarily. She felt that Mr. Mueller had "a very good rapport with customers" (2 TR 101). His orders were not returned anymore frequently because of material-ordering mistakes. She established that it was "common for there to be hitches" in work orders, at least 80 percent having them (2 TR 97).

11c. Mr. Mueller's first-line supervisor up until July 26 (Mr. Kolwitz) thought that "[o]verall" the performance of Mr. Mueller was "good" (2 TR 300 and GC 10.2) and that he was a "fast learner" (GC 10.2). Mr. Kolwitz expressed to Mr. Schmidt his concern that Mr. Mueller's "low performance," on some jobs, was "probably his [Mr. Kolwitz'] fault" (2 TR 285).

11d. Mr. Mueller himself admitted to lapses in performance as to the instances cited in the November 17 notice of termination letter. But he testified that this was not such a poor record, since he had handled over 100 work orders during the period of his employment. He also expressed his view to management that, since his supervisors reviewed all his work, the lapses were really in supervision by Mr. Bausano and Mr. Kolwitz. Mr. Bausano admitted that he had no real construction experience. And Mr. Kolwitz was judged by Colonel True as a "substandard" employee in terms of performance (3 TR 3). Mr. Mueller admitted to setting his own priorities for accomplishing the workload of the planning section and put facility surveys last, even when asked, several times, to complete them on schedule.

12. Another reason given for termination was reliability in attendance, specifically that Mr. Mueller had been counseled on two occasions in less than 6 months to use the sign-out sheet, so that his location during duty hours could be determined, and that as recently as November 15 he had neglected to do so. See GC 10.25. Mr. Mueller appeared to regard the use of sign-out sheets as a trivial matter. He claims that he was only told once to use the sign-out sheet; but he then admitted it may have been more than once. See 1 TR 105. He explained that he did so 75 percent of the time, which was "no worse than anyone else in the Civil Engineering Section" (GC 9.3). Ms. Skinner confirmed that others did not always sign out. Mr. Bausano conceded that the

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standard applied to Mr. Mueller for use of the sign-out sheet represented a higher one than had been in effect in CE. See 2 TR 215-216.

13. The final reason given for termination concerned the "bad attitude" of Mr. Mueller (GC 8.1). Cited were problems of "arrogance and unwillingness to follow departmental procedure;" "abusive style of conversation concerning the job, concerning the government in general, and concerning other employees;" "disruption and discontent resulting from [his] actions;" "excessive gossiping during duty hours;" "misuse of government phones;" and "insubordination."

13a. Mr. Mueller admitted feeling superior to his supervisors; to some name-calling of them, in front of others; and to using his office phone for personal calls. Name-calling and personal use of office phones are not uncommon, in CE.

13b. On December 15, 1981, Mr. Kolwitz documented, in Mr. Mueller's personnel file, the fact that shop personnel had told him that Mr. Mueller was "acting like the [B]ase [E]ng[ineer]" (GC 10.1). On January 21, he also documented the fact that Mr. Mueller was "acting like the boss over [his] personnel" (GC 10.2). On January 27, he also documented the fact that Mr. Mueller was going over his head, to Colonel True and Mr. Schmidt. See GC 10.2. Mr. Kolwitz did not testify.

13c. Several employees presently employed in CE did testify to the fact that Mr. Mueller tried to supervise them even though he was not their supervisor.

13d. An employee in the Contracting Office, and her supervisor, testified to Mr. Mueller's arrogance and distain for following applicable government regulations. These two witnesses for Respondent are not under the supervision of Colonel True, and appeared to be sincere and honest in giving their testimony. Accordingly, I have fully credited them and placed considerable weight upon their testimony. Maintaining good relations with personnel in the Contracting Office is important to the accomplishment of the work in CE because only they can place orders for material and arrange for work to be done by outside contractors.

13e. With some customers of CE, Mr. Mueller had amicable and courteous working relationships. See 2 TR 193-194. For example, Mr. Bausano recalled that the "[p]eople in disaster preparedness office indicated that . . . Mr. Mueller was an okay person in their estimation" (2 TR 193). And the Wing Senior Recruiter wrote a laudatory letter to Mr. True about Mr. Mueller, on September 13, about a completed work order. In the letter he praised him for his "daily diligent attention to small and large details, friendly, receptive, cooperative attitude . . . [and] professionalism . . ." (GC 6). The letter called him as a "true quality asset" to CE and expressed "pleasure to work with an individual of his caliber" (GC 6). The praise from the Wing Senior Recruiter was documented in Mr. Mueller's personnel file.

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13f. Mr. Bausano had a "hot" discussion with Mr. Mueller on his first day as his supervisor (2 TR 138). Mr. Bausano began to document problems with Mr. Mueller on August 27, when he had a formal counseling session with Mr. Mueller. See GC 10.7 and 8. Another formal counseling session took place on October 13 and was also documented. See GC 10.14 and .15.

13g. Mr. Bausano testified as to the two formal counseling sessions; and his testimony was not rebutted by Mr. Mueller. Mr. Bausano is currently an employee in CE and acted and testified under the scrutiny of Colonel True, who promoted him following his detail as the supervisor of Mr. Mueller. Accordingly, I observed, with particular concern, his demeanor as a witness. He appeared to be uncomfortable and reluctant to testify against Mr. Mueller; but he also appeared to be honest and to give careful consideration to what he was saying. What he had to say was corroborated, in some respects, by others. Accordingly, I have credited his testimony.

13h. Mr. Bausano established that he explained to Mr. Mueller that his "loud, very abusive" criticism and very negative remarks about the organization "caused other people to react in kind" (2 TR 143). He established that he "tried to get the point across that this is just continuing to stir things up" (2 TR 143). He established that he told Mr. Mueller to express his feelings privately, but that "while we're in the work place why should we keep things continually at a fever pitch. Let's tone down a little" (2 TR 143). Mr. Bausano established that these remarks did not refer to "union remarks," but rather about "people [Mr. Mueller] didn't like or the way things were done" and "regulations he didn't care for" (2 TR 143-144). Mr. Bausano established that Mr. Mueller expressed the view that there were a lot of unnecessary steps required in Air Force regulations and that there was a better way of doing things.

13i. Mr. Bausano established that Mr. Mueller, in public, made such loud remarks about Mr. Schmidt as his being "too dumb to have the job," that he "was screwing things up," that he was a "tankbrain," a "dogbreath" or "doghead," and that he had "shit for brains" (2 TR 145). Mr. Bausano established that Mr. Mueller also felt "pretty strongly" about Mr. Tojek, and made remarks "about just about anyone that may have gotten on his bad side for something during the day" (2 TR 144). While other employees also engaged in name-calling, what set Mr. Mueller apart was the fact that it was "more constant about it than others and seemed so negative . . ." (2 TR 221).

13j. On August 26, Mr. Bausano documented an observation by Norman Ross, a supervisor acting in the stead of Mr. Schmidt on that day. The documentation states: "On 26 August 1982, Herb Mueller was observed in bldg 218 to visit Mr. Mahnke, the Union Representative, without permission form his supervisor and without specific business at bldg 218" (GC

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10.6). Mr. Ross told Mr. Bausano that he was "supposed to keep of where [his] people are" (2 TR 185).

13k. Mr. Bausano observed that Mr. Mueller did not take counseling "in a constructive manner," that he "would usually chuckle about it toward the end[,] that this was something [Mr. Bausano] had to do, and [Mr. Mueller] realized things would be documented, but he had things he wanted to go for and that was it" (2 TR 149).

131. From my own observation of Mr. Mueller, I judge him to be a brash, free-spirited type of person, unlikely to be much concerned about government regulations or deferential toward supervisors.

14. On November 1, Mr. Bausano put a "progress report" into the file of Mr. Mueller (2 TR 160). The report notes "no overall improvement" in Mr. Mueller's "[b]ad [a]ttitude," and that complaints continued to be made to him by CE personnel and other offices (GC 10.17). The complaints were to "his deep bitterness and resentment toward the organization and government employees and programs, the refusal by Herb to let others speak their opinion or explain their ideas as customers or as coparticipants in work efforts," about his "arrogance and bad temper," and "inability to accept criticism, suggestions, or even questions . . ." (GC 10.17). The Contracting Office and shop supervisors continued to complain about Mr. Mueller. He continued to engage in "extended conversation involving gossip, outside business plans, and items of personal concern continue to be a problem" (GC 10.18).

Facts relating to the union activities of Mr. Mueller

15. Mr. Mueller had been a contractor before coming to work for Respondent and had formed a "general dislike for unions" (TR 35) which he voiced to a union steward for AFGE, Sandra Skinner, and to Mr. Schmidt, among other employees of Respondent. Mr. Mueller voiced this dislike to Mr. Schmidt on the first day he was hired. During his early months of employment by Respondent, Mr. Mueller was not a union member and had no contact with union officials other than casual conversations with Ms. Skinner, who was a co-worker in his work area.

16. Between September 1981 and the latter part of July or early August 1982, Mr. Mueller came to believe that management was doing "a fine job," from the administrative standpoint, and a "very poor" one with regard to labor relations (TR 37); but he basically minded his own business and did not express to anyone what he viewed as problems in CE.

17. In the latter part of July, or early part of August 1982, Mr. Mueller initiated a meeting with Mr. Springer, to discuss the way management was dealing with employees in CE, and to state that he did not think the termination of Vern Snyder, a supervisor in CE, was necessary. Mr. Springer told Mr. Mueller that "they were keeping an eye on things

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over in civil engineering" and suggested that he talk to Colonel McMahon, the Base Commander (TR 39).

18. Mr. Mueller made an appointment to see Colonel McMahon and saw him approximately a few days after meeting with Mr. Springer. Mr. Mueller covered the same points he had made with Mr. Springer. Colonel McMahon said he would check into it.

19. Mr. Mueller heard nothing from Colonel McMahon. Mr. Snyder's termination was 2 or 3 days away, so "kind of grasping at straws," Mr. Mueller contacted the Union (1 TR 42).

20. On August 12, 14 employees sent a memorandum to Mark Button, Chief Steward for the Union. The employees were from Building 106, which houses CE. The subject was "Action for Informational Picketing" (GC 12). It stated that the employees wanted to start an informational picket action on August 14 and asked for a reply to their concerns by 11:30 a.m. on August 13, "in order to hold the picket action" (GC 12). The concerns expressed were for Colonel McMahon to initiate an investigation of CE management, and restrain the firing of Mr. Snyder until the investigation had ended and a final conclusion reached.

20a. Mr. Mueller was the author of the August 12 memorandum, which was written during the workday. The signature of Mr. Mueller heads the list on the left-hand side of the double row of signatures. It was typed by Ms. Skinner. Mr. Mueller reviewed the memorandum with other signatories, at their work sites, and had them sign it.

20b. Mr. Mueller also circulated the memorandum at a retirement party for Mr. Snyder, held on August 12, 1982. The party was held in the evening, after duty hours, at a club on the base. Numerous employees of CE were there, as were management people, including Mr. Schmidt. Mr. Mueller took the memorandum from table to table, at the party, and asked people to read and sign it. Mr. Schmidt was standing next to one of these tables. The words "picket" and "union" were used by Mr. Mueller, in discussing the memorandum.

20c. Outside the club, on the evening of the party, Mr. Mueller showed the memorandum to Mark Button, who was then Chief Steward of the Union and also its Executive Vice-President. Mr. Button stated that "people may have to picket" (1 TR 50) and that more signatures were needed as a "show of hands of who wanted to do this" (2 TR 7).

20d. The morning after the party, Mr. Mueller obtained some more signatures and gave the memorandum to Ms. Skinner to give to Mr. Button, for presentation to Colonel McMahon.

20e. Mr. Bausano, Mr. Bratlein and Mr. Schmidt never saw this memorandum. Colonel True did, in Colonel McMahon's office, on August 13,

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when Mr. Button handed the document to Colonel McMahon. Colonel True just saw "the paper go by" and did not read it (2 TR 377).

20f. Colonel McMahon told Mr. Button that the memorandum was not addressed to him and, if he wanted action on it, it would be necessary for Mr. Button to cover it with an endorsement. Mr. Button told Colonel McMahon that the Union was backing the CE employees. The Colonel asked for the union's endorsement in writing. Mr. Button replied that this was not necessary, since the Colonel had his word that the Union was backing it. Subsequently, the Colonel called Mr. Button to ask, again, if the Union was going to back the picketing, and if he was going to receive a letter to that effect. Mr. Button again affirmed that the Union was backing the picketing and that a letter was not necessary. Then the Colonel told Mr. Button that he "could not stop the firing" (2 TR 11).

20g. The memorandum of August 12 was not a grievance. Mr. Snyder was a member of management.

21. The initial idea to picket came from Mr. Mueller. He realized that something had to be done at about 11:00 a.m. on Friday, August 13, when nothing had been heard from Colonel McMahon, and Mr. Snyder started "clearing" (1 TR 51). That afternoon, Mr. Mueller began conversing with employees in regard to picketing. He did so in the office, throughout the work sites, and in the boiler room, wherever he saw a CE employee. He probably talked to just about all of the CE employees. Mr. Mueller was "extremely open" in everything he did (1 TR 52).

22. After duty hours on Friday, August 13, 1982, a meeting of CE employees was called by the Union in regard to the picketing. In attendance were the president of Local 2144, Ken Mischka, its vice-president, Mr. Button, the unit representative in CE, Jeff Mahne, and all the CE employees who had signed the letter. The only previous Union meeting attended by Mr. Mueller had been one held the night before this one. Details of the picketing were discussed. Among othe things, the Union and the CE employees decided where to picket and what would be on the picket signs. Selection of sign language was decided by vote of those present. Mr. Mueller was appointed as one of the picket captains, to provide flyers to people who stopped their vehicles and to be interviewed by the media. The picketing was planned to start the following day, a Saturday. This particular day was chosen because all the Air Force Reserves would be starting a 2-day training period on that day.

23. Before picketing began, an unsigned letter circulated around the base. The letter allegedly said something about employees who picketed being subject to firing. A copy was not adduced for the record; and little weight is accorded to testimony about it. No one on the picket line was fired, except for Mr. Mueller. Two have been promoted -- Karen Kopenhaffer and Mr. Angoli. Mr. Angoli was also a probationary employee, at the time of the picketing; and he was on the picket line all the time.

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He was promoted sometime in January 1983. Ms. Kopenhaffer's promotion was not a decision of CE management, because she was selected for a job outside the CE division.

24. The picketing began at 6:30 a.m. on Saturday, August 14, and continued for about 10 days. The picket line was formed directly across the street from the main gate, which is used by 99 percent of base employees. Approximately 20 or 22 people gathered to picket, all carrying signs. Each had an "AFGE" symbol on it. The signs stated such things as "poor management, fraud, and abuse of government tax dollars and Caesar's Palace" (1 TR 56). One referred to "sexual harassment" (2 TR 14). These topics had been discussed in a meeting, in February, between the union officials and General Balch, the Wing Commander.

24a. Mr. Mueller missed only 1 or 2 days on the picket line. Mr. Bausano, Mr. Bratlein, Mr. Schmidt and Colonel True all observed him on the line. However, there is no credible evidence that they were aware that he had a leadership role in the picketing.

24b. Mr. Schmidt, Colonel True and Mr. Bratlein at first thought the picketing was over a 1981 change in hours, which had gone to arbitration and the arbitrator had ruled, in July 1982, in favor of management. In the spring of 1982, and continuously thereafter, employees had threatened to picket over this change. Mr. Schmidt also thought it was over the firing of a Mr. Francisco (see finding 38a, infra), but then read, in the papers, that it was over the firing of Mr. Snyder. Colonel True and Mr. Schmidt professed to be unconcerned about the picketing. Both witnessed it and heard about it over television or the radio, or both.

24c. Bargaining-unit members were informed of the picketing, by flyers, and asked to join the line. Some were not aware of the reasons for the picketing.

24d. Four to six special union meetings were held during the picketing, after duty hours, on the base. Mr. Mueller attended them all.

24e. On the first Monday of the picketing, Mr. Mueller joined the Union and was put on dues withholding. Dues withholding information is held only by the Personnel Office and is not released to "management" (2 TR 228). There is no credible evidence that any of Mr. Mueller's supervisors knew that he was a union member.

24f. Colonel True never tried to discourage the employees from picketing. He told the CE employees and staff that "the picketing was legal and as far as he was concerned no effort would be made to stop it and business would go on as usual" (2 TR 117). He told his staff "to keep it low-keyed" and to be "cooperative . . . [about] people going out during lunch and stuff" (2 TR 348-349).

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24g. During the picketing, the Union learned that management had indicated in press interviews that they did not know what the picketing was about. Mr. Button wrote a memorandum to the Civilian Personnel Officer, dated August 20, 1982, setting forth the allegations of the CE employees. See GC 15. Mr. Button and Mr. Mischka signed the memo for the Union. The Union gave the letter to Mr. Springer, and subsequently met with Mr. Springer, Mr. Taylor, and members of management. The memorandum listed six allegations: harassment; mismanagement; discrimination; misuse of government funds; misuse of contract services; and coverup and collusion. Mr. Mueller contributed the last two items to the memorandum. None of these allegations were considered as "grievances" by the Union (2 TR 58). In the memorandum, the Union asked for an investigation and the removal of Colonel True and Mr. Schmidt from their positions of authority. The memorandum was given to the Civilian Personnel Officer.

24h. After some negotiations, the Union agreed to take the names of the two supervisors off the memorandum dated August 20, and to stop the picketing, if an investigation would take place. These negotiations took place on a Friday. The picketing stopped the following Monday.

25. After these negotiations, Mr. Taylor told the Union that he needed some information on what to look for in an investigation. Mr. Mueller was asked by Mr. Button to draft a letter detailing what they wanted investigated over in CE. Towards the end of August or the first part of September, Mr. Mueller complied with this request by drafting what was introduced into evidence as GC 13. Mr. Mueller also drafted it for the purpose of requesting a congressional investigation. The draft was "To: AFGE - Union President and Vice President;" was "From: Civil Engineering Employees;" and was labeled "Request for Congressional Investigation" (GC 13.1).

25a. The draft was prepared in Mr. Mueller's office and typed by Ms. Skinner. In preparing the draft, Mr. Mueller had discussions with Ms. Skinner, Larry Holmes, and maybe a couple of other people. Mr. Holmes was the union steward for CE. They also pulled office files in regard to work orders mentioned in the draft. The draft was signed by 11 CE employees and Mr. Mueller. Mr. Mueller discussed the draft with each of the 11 signatories, at the work site where they happened to be, and during duty hours.

25b. The draft listed 10 charges, naming Colonel True, Mr. Schmidt, Mr. Bratlein, and Mr. Tojek as colluding on a number of them and listing Mr. Heiberg, Mr. Bausano, Mr. Tojek and Mr. Moriarity as examples of one change, preselection of employees. The draft also asked for an investigation into the qualifications of Mr. Tojek and Mr. Moriarity. It also listed eight work orders in connection with a change of "pyramiding" and "cover-up" (GC 13.2).

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25c. This document (GC 13) was not considered to be a "grievance" by the Union (2 TR 58).

25d. After some discussion, the union officials decided to give a sanitized copy to management which blanked out the names of the CE employees who signed the memorandum, and the work orders. Since only a "very few" employees would have access to work-order numbers (2 TR 35), the Union was fearful that management would know who had drafted the memorandum. Mr. Mueller is one who had access to work-order numbers.

25e. The sanitized memorandum was handed over by Mr. Button to Mr. Taylor, in the presence of Mr. Mischka and Myrtle Honel, Civilian Personnel Officer. Management indicated that it needed the work-order numbers in order to investigate. Ms. Honel indicated that she "thought she knew who made the letter up or drafted the letter" (2 TR 34). This person was Ms. Skinner who is privy to such information by virtue of her job.

25f. Mr. Bausano and Mr. Schmidt never saw this memorandum. Mr. Schmidt also testified that he was unaware of its subject matter, but did not appear sure. See 2 TR 307. Mr. Bratlein and Colonel True saw the document, without the signatures. Colonel True recalled receiving it from Mr. Taylor on August 27. But Mr. Button testified that he did not hand the document over to management until early September. See 2 TR 32. Mr. Bratlein conceded that some of the information in it might have come from Ms. Kopenhaffer, Ms. Skinner or Mr. Mueller. See 2 TR 359-360. He knew Mr. Mueller had raised concerns about preselection. He acknowledged that it would have been reasonable to assume that Mr. Mueller and some other CE employees in certain sections developed the document handed over to management. Of these employees, Mr. Mueller was the only probationary one.

25g. Colonel True professed not to care, to question, or to theorize on who created this document. See 3 TR 36-37. He read it "more than once" and then put it aside (3 TR 37). He professed to have no "curiosity" or "concern" about its subject matter (3 TR 38). He also claimed that he did not read the picket signs, which he drove by 14 times. There had been "allegations of Congressional investigation" from 1980 to 1982 (3 TR 45). When Mr. Taylor gave him the document, Colonel True "jokingly said, well it looks like another Congressional investigation we'll never see" (3 TR 46). Colonel True's professions of unconcern, etc. did not strike me as sincere. He appeared to be an authoritarian-type of man, determined to run an efficient organization and unlikely to appreciate criticism, or not wonder what it was all about.

26. During the month of September 1982, Mr. Mueller and Mr. Button got together "quite often," at least once a week, throughout the base and while both were on duty (2 TR 36). The purpose of their meetings and conversations was to put together a package of evidence concerning the

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allegations being made by CE employees, to present them to congressmen, and to discuss what the Union had arrived at with management in regard to management's investigation.

27. In September, Mr. Mueller, Mr. Button, Mr. Holmes, and Mr. Mischka met with Congressman Zablocki. They took annual leave for the meeting. They provided him with their documentation concerning the allegations of the CE employees. The documentation came from researching and copying different materials in the files of the CE building. Mr. Button acted as the spokesperson and announced that they were all from AFGE. Congressman Zablocki reflected that "he thought we were opening a can of worms that should be left closed" (2 TR 39). Apparently an investigation of mismanagement, in CE, had been investigated, in 1980, and a "clean bill of health" had resulted (2 TR 312).

28. In October, Mr. Mueller, Mr. Mischka and Mr. Button met with Congressman Aspen. Again, all took annual leave. Again, Mr. Button acted as spokesman and announced that they were all from AFGE. Again, the allegations of the CE employees were presented.

29. Before these visits with the congressmen, Mr. Mueller discussed them with Mr. Holmes and a couple of other people in the CE office, and also made telephone calls about them to Mr. Mischka and Mr. Button -- all during duty hours. Mr. Mueller and Ms. Skinner, who shared the same office which was in a "high traffic area" used by management, discussed these matters and tried to do so "discreetly" (2 TR 82).

30. Following the meeting with Congressman Aspen, Mr. Mueller, Mr. Mischka and Mr. Button went to the airport in Racine and met with Congressmen Aspen and Udall. Members of the media took pictures of the group. Mr. Mueller examined the pictures in the office, at his desk, and discussed them with Ms. Skinner. Whether the pictures were published or seen by management officials was not established. Mr. True was unaware, until after Mr. Mueller was terminated, that he had been meeting with congressmen.

31. In September, management did investigate the CE Division. Someone from the Chicago personnel office of the Air Force interviewed Mr. Mueller. Mr. Mueller told the investigator what he thought of the CE Division's management and that he had "authored these different letters and forms," including GC 13 (see finding 25, supra). Whereupon, the investigator wrote Mr. Mueller's name across the copy of GC 13, which Mr. Mueller gave him (1 TR 76). Whether this information got back to Mr. Mueller's supervisors was not established.

32. Mr. Mueller did ask for and receive official time for "union activities," on occasion, from Mr. Bausano, after Mr. Bausano checked it out to see if it was legal (2 TR 178).

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33. No management official ever tried to dissuade Mr. Mueller from participating in union activities. The only union activity of Mr. Mueller which bothered Mr. Bausano was "the amount of time that was spent misusing the phones" (2 TR 178). Had Mr. Mueller asked for official time to conduct union business over the phone, Mr. Bausano would have given it to him.

Facts relating to general problems in CE

34. Mr. Button conceded that before Colonel True arrived in CE, in October 1980, "civil engineering was a mess" and that Colonel True was sent to CE, "[a]s a hatchet man" and "[t]o get the organization moving" (2 TR 59).

35. Colonel True found "total chaos" in CE, upon his arrival (2 TR 371). His predecessor had suffered a mental breakdown. There was no "management structure, control, reporting capabilities or knowledge of what was going on in the division" (2 TR 371).

36. During his first week in CE, union officials and grievants spent 20 hours in Colonel True's office. Well into 1981, they were spending an average of about 15 hours a week in his office, with a peak in July through August 1981, when he made the change in the hours of work. See finding 24b, supra.

36a. Although the proportion of CE employees at the 440th Wing is very small, they are involved in 89 percent of the grievances filed and 80-90 percent of the charges of unfair labor practices. Some involve Colonel True, Mr. Schmidt, and Mr. Tojek, now a foreman in CE, but just an employee in the electric shop of CE when Mr. Mueller was employed. The number of grievances has dropped off "considerably . . . in the last year" (2 TR 124).

36b. In February, a group grievance was directed to Colonel True. In May, another was directed to Mr. Schmidt. The grievances alleged spying on and harassment of employees and complained of ratings, including Mr. Schmidt lowering ratings given by te first-line supervisors. These grievances do not appear to have been signed by Mr. Mueller. See AE 2 and 3.

36c. Colonel True testified that he was "pretty well desensitized to group grievances, ULP's [an apparent reference to unfair labor practice charges], FSIP's [a reference to submissions to the Federal Services Impasses Panel], or the whole alphabet soup of the kinds of things that can be used to frustrate the legitimate demands of management" (2 TR 374). He professed that a "union can contribute very well to increased efficiency in government" and that "the representatives we have now in civil engineering and the employees are able to do that" (2 TR 374).

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37. Since September, the union steward for CE has been Larry Holmes. He was the CE employee seen by Colonel True, on television, while being interviewed as a spokesman for the picketers. Mr. Mueller was also interviewed; but there is no evidence that this filmed sequence was seen by any CE supervisor of Mr. Mueller.

37a. Mr. Holmes tried to resign as steward when, after 4 hours in the position, he faced his friends "accosting him in the hall" over grievances which, as related by Colonel True, were "completely beyond his [Mr. Holmes'] control" (2 TR 375). Although Colonel True knew that Mr. Holmes had been a spokesman for CE employees during the picketing, Colonel True encouraged him to keep the job and assured him "that he had my support, that I felt he was a very level head in maintaining good labor relations within civil engineering" (2 TR 375). Colonel True has "cordial" relations with Mr. Holmes (2 TR 119) and is "very pleased" with Mr. Holmes' performance, as steward, in resolving problems (2 TR 375). His predecessor as steward for CE was not employed in CE and took grievances to arbitration.

37b. No adverse action has been taken against Mr. Holmes, since the picketing. However, when Colonel True first came to CE, Mr. Holmes received reprimands and letters of caution.

38. There are 88 employees in CE of whom 11 are supervisors. In August 1982, 28 or 29 of these employees were in the Fire Department over which Colonel True presides as Base Fire Marshal. Since Colonel True became head of CE, 15 CE employees have been "terminated" during their probationary year (2 TR 384). Colonel True attaches "a significant amount of importance to the probationary period," because he regards "the examination process by OPM [a]s imperfect at best" (2 TR 385). A "rash of terminations" occurred in July (1 TR 93).

38a. One probationary employee terminated by Colonel True was Donald Francisco. He was terminated on November 22, 1980, on the advice of Mr. Schmidt. The Union feels that he was terminated for being a "whistleblower" (2 TR 21) and has been representing Mr. Francisco since his termination. As of the time of this hearing, his case is in a Federal court. Colonel True, General Balch, Mr. Kolwitz, and Mr. Schmidt are named in documents filed in the case. The case has been discussed by union officials with Colonel True. Mr. Francisco is a controversial figure among CE employees, some of whom signed a group grievance, on September 15, 1980, asking for his termination.

38b. Another terminated CE employee was Barry Kliner. He replaced Mr. Bausano on December 8 as supervisor of the planning section. He was terminated in May 1983. According to Colonel True, he was terminated for being generally inattentive to his job, incapable of organization, and reading periodicals and magazines not connected with his work. See 3 TR 5. He resigned because he was going to be removed. According to Ms. Skinner, whose testimony I have credited (see findings 11b, supra),

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Mr. Kliner told her that, on six or eight occasions, he refused to "write [her] up," when told to do so by Mr. Schmidt (2 TR 106), and complained to her that "he was not allowed to act as a supervisor" and "was always dictated to" (2 TR 109). Mr. Kliner was not called as a witness. Mr. Schmidt, who testified after Ms. Skinner, did not deny his role vis-a-vis Mr. Kliner, or what he instructed Mr. Kliner to do. Accordingly, I credit what Mr. Kliner told Ms. Skinner as true.

38c. Two other supervisors were terminated by Mr. True. One was Mr. Kolwitz. Mr. Kolwitz retired when faced with a removal action. The problem Colonel True found with Mr. Kolwitz was "substandard" performance and "documenting employee behavior" (3 TR 2). Documentation of employee behavior is high on Colonel True's agenda for getting CE moving out of the mess he found when he took over.

38d. The other terminated supervisor was Mr. Snyder. He was found to be "insensitive to carrying out the goals of the organization in terms of supervising his employees, maintaining positive control of them, and the general uncooperativeness towards the goal of management" (3 TR 4). He also retired when faced with a removal action.

Discussion and Conclusions

The General Counsel and the Charging Party agree that in order to prevail in this action, it must first be established that "protected conduct [union activities] was a motivating factor in the decision adversely affecting the employee" (GCBr 12 and see also CPBr 23).

Assuming, arguendo, that Mr. Mueller engaged in union activities (an easy assumption on this record), I nevertheless cannot find that such activities motivated his termination, for the following reasons.

A. First of all, it was clearly established that Mr. Mueller, quite apart from his union activities, was not the type of employee to survive a probationary period in an organization commanded by Colonel True. By the admission of the Union's own vice president, Colonel True came to CE charged with the responsibility of acting as a "hatchet man" and getting the organization moving. See finding 34, supra. A rash of terminations followed his assumption of duties, including terminations of supervisors who were lax about following orders such as documenting employee performance. Mr. Mueller was not the only employee terminated by Colonel True during his probationary period -- 15 others suffered the same fate. Colonel True struck me as being an authoritarian person, who might brook some honest mistakes in performance, but would never tolerate a bad attitude on the part of an employee in a probationary status.

And it was established that Mr. Mueller had a bad attitude, insofar as fitting into a large, military organization with a prescribed chain of command and a myriad of regulations to follow. He appeared to be a brash, free-spirited sort of person. As early as December 1981, many

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months before he began any union activities, Mr. Mueller embarked upon a course of conduct that was bound to put him on a colision course with Colonel True -- namely acting like the Base Engineer around shop personnel. On January 21 his first-line supervisor documented the fact that Mr. Mueller was "acting like a boss" over his personnel. See finding 13b, supra. This same supervisor, on January 27, documented the fact that Mr. Mueller was not following the chain of command. Personnel in the Contracting Office, through whom CE has to deal in obtaining materials and the services of contractors, complained of his arrogance and distain for following government regulations. He engaged publicly and constantly in a campaign of demeaning his supervisors. He did not take counseling seriously. He was careless about letting his first-line supervisor know where he could be located during duty hours, and regarded documentation of this fault as trivial (Colonel True was a stickler about documentation by his supervisors). He set his own priorities in accomplishing his duties. He did not change in his attitudes over the course of his employment.

Mr. Mueller was a hard-working individual and had to learn and perform his work under first-line supervisors who were themselves somewhat inadequate. His mistakes, as a planner, in estimating work orders do not appear to be of such a serious nature as to justify his termination, taken by themselves. But neither was his performance of such an outstanding nature that Colonel True would overlook what a man of Colonel True's nature would regard as a bad attitude toward the organization. Probationary periods are established to ferret out just such individuals. As Mr. Bratlein put it, the "basic question" asked about an employee coming up to the end of a probationary period is "would you like to retain this person forever." See finding 3, supra. It was not unexpected that someone like Colonel True would answer that question in the negative, as to Mr. Mueller.

B. Other CE employees were heavily and noticeably engaged in the same informational picketing activities as Mr. Mueller and were so observed by CE supervisors. Yet none of the others suffered any adverse action as a result.

C. While Colonel True expressed annoyance at the "whole alphabet soup of the kinds of things that can be used to frustrate the legitimate demands of government," including group grievances and charges of unfair labor practices (see finding 36c, supra), he nevertheless acted in accord with the law when the informational picketing began -- he did not discourage employees from picketing and cautioned his staff that it was "legal" and that no effort should be mad to stop it. See finding 24f, supra. It fits the character of Colonel True, as I observed him, that he would adhere, faithfully, to what was "legal." I also accept, as valid, the characterization of Colonel True as a "heavy-handed" manager and "a man of strong opinion" (CPBr 27). But I do not draw from these character traits the conclusion that Colonel True would commit the illegal act of

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terminating an employee for engaging in union activities criticizing Colonel True's organization.

D. The General Counsel and the Charging Party rely heavily upon the fact that, on September 22, 1982 Mr. Mueller's first and second-line supervisors signed off on a "Fully Successful" performance appraisal on him. See GCBr 3-4, CPBr 30-31 and finding 6, supra. However, I view as adequate Respondent's explanation that this rating was "presumptive" only, and not truly reflective of the views of Mr. Mueller's supervisors. See findings 6a-6c, supra.

E. Colonel True's credibility as "the key witness" is challenged. See GCBr 16. And I too doubt his candor, on some points raised by the General Counsel. For one thing, I doubt his asserted lack of knowledge about what was on the picket signs. He admitted to listening to the television coverage of the picketing and, as a responsible manager, would hardly ignore the substance of what his employees were so publicly complaining. I also doubt his assertion that he was uncompletely unaware of the extent of Mr. Mueller's activities on behalf of the Union. However, the conclusion I have reached in points A through C, supra, do not turn on belief in what Colonel True, alone, had to say.

F. The General Counsel argues, and I agree, that Colonel True was "the key decision maker" in terminating Mr. Mueller (GCBr 21). I also agree that Colonel True indicated a dislike for union grievances and charges that could be used to frustrate legitimate managerial demands. See GCBr 23-24. However, the facts establish that Colonel True recognizes the legal rights of unions, abides by them, and tries to cooperate. See findings 24f, 36c, 37 and 37a.

G. The General Counsel and the Charging Party suggest that Colonel True's present cordial relations with the current union steward for AFGE in CE, Larry Holmes, is because Mr. Holmes is "nicely under his control" (GCBr 25-27 and see also CPBr 26-33). Unlike his predecessor, Mr. Holmes is and has been a CE employee. Nevertheless, he dared to picket and to speak out, over television, against Colonel True's organization while under his supervision. See finding 37, supra. So I doubt that Mr. Holmes is likely now to be unduly influenced by Colonel True, in the execution of his union duties. Were this case, it would seem likely that the Union would have replaced him, which it has not done, insofar as the record shows.

H. The General Counsel also argues, as evidence of "union animus," the testimony of Colonel True to the effect that the Union posts the names of stewards so frequently that he had difficulty keeping track of them. See GCBr 24 and 3 TR 24-25. I find little, if any, suggestion of animus in such testimony.

I. The General Counsel also points to testimony of Mr. Bausano, namely that throughout the period Mr. Bausano supervised Mr. Mueller,

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including the period of the picketing, Mr. Mueller, while in the office, would stir up people by engaging in time-consuming, loud arguments with them. See GCBr 20-21. From this, the General Counsel concludes that the stirring up and loud arguing had to do with union activities, and that this is the reason Mr. Mueller lost his job. I do not draw such a conclusion. A supervisor who might be in complete sympathy with union activities, would quite naturally become concerned when those union activities were taking place at the work site, during duty hours, and interfering with his getting work out of his staff.

J. The General Counsel argues that Mr. Mueller was treated differently from other similarly situated. See GCBr 25-26. In support, the General Counsel points to the promotion of two employees who also picketed, one being another probationary employee, Mr. Angoli, who apparently received his promotion at about the same time management was put on notice of the unfair labor practice charge initiating this case. See 3 TR 19-23. Neither was shown to have assumed such a leadership role in the picketing, as did Mr. Mueller. But neither were they shown to have the personality traits which Mr. Mueller exhibited. A number of probationers were terminated by Colonel True in his attempt to rectify the mess which admittedly existed when he took over command.

K. The General Counsel argues that the reasons given by Respondent for terminating Mr. Mueller were pretextual, and its witnesses unreliable. See GCBr 27-28.

As for all the witnesses, I have been wary of relying, too heavily, upon the testimony of those employed in CE, who had to testify under the watch of their boss, Colonel True, and who gave damaging testimony concerning Mr. Mueller. In particular, Michael Bratlein, Harry Hamilton, Felix Mercado, and Phillip Tojek seems overly willing to indict Mr. Mueller and, in the case of Mr. Hamilton, to extoll the virtues of Colonel True. On the other hand, Mr. Bausano, while appearing uncomfortable in his role as a witness, nevertheless struck me as being sincere and honest in his evaluation of Mr. Mueller. See finding 13g, supra. I do believe that he yielded to pressure in recommending termination, rather than some less stringent steps to deal with Mr. Mueller. I believe that he did so, honestly, in consideration of the opinions of others who had worked with Mr. Mueller for a longer time than he had, and who would continue to have to do so. Mr. Schmidt struck me as a faithful soldier marching to Colonel True's command, and less than candid, in some respects, particularly in disavowing any concern over the picketing.

I have credited fully the testimony of the witnesses from the Contracting Office, who are not under the control of Colonel True, and who established that Mr. Mueller was arrogant in his dealings with them and exhibited a distain for the government regulations which they must follow in procurement. I have also relied greatly upon my own observation of Mr. Mueller and Colonel True, and upon the testimony of Mr. Button, the Union's Vice Presidnet, who described Colonel True as a

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"hatchet man" sent to bring order out of the "mess" in CE. See finding 34, supra. Such a "hatchet man" would not be likely to tolerate an employee of Mr. Mueller's propensities, quite apart from any union activities.

I agree with the General Counsel to the extent of concluding that Mr. Mueller's performance in estimating, use of the sign-out board, and misuse of government phones, even taken together, would probably not have triggered the termination of Mr. Mueller. But I disagree that these factors when added to his bad attitude, should be considered "sham and pretex[tual] "reasons for this adverse action (GCBr 27-28). The evidence convinces me that the bad attitude charge was the primary reason for Mr. Mueller's termination and the others were make-weight, but nevertheless real ones.

L. A troubling point made by the General Counsel and the Charging Party concerns the fact that Mr. Bausano began documenting problems with Mr. Mueller around August 26, at about the same time that Mr. Mueller's active union activities began and Colonel True received a copy of GC 13, the document detailing problems in CE, and drafted by Mr. Mueller. See GCBr 29; CPBr 29; and finding 25-25f, supra. However, Mr. Bausano's supervisory role did not begin until July 26. So it does not seem unduly suspicious that a month would pass before he would begin formal documentation of problems observed. And since Colonel True was placing pressure on all supervisors to document employee problems, as a part of his campaign to straighten out management, in CE, it is not unduly suspicious that Mr. Bausano would document the problems he was having with Mr. Mueller.

Also, Colonel True did not receive GC 13 until August 27 at the earliest, (see finding 25f, supra); and it was sanitized by the Union to conceal the names of the employees who signed it.

On the same day, August 27, Mr. Bausano had his first formal and documented counseling with Mr. Mueller (GC 10.7 and .8) for which he had prepared by making out a list of things he wanted to go over. The record does not indicate the time of day, on August 27, that Colonel True might have received the copy of document, or the time of counseling. Indeed, Colonel True may not have received the document until early September. Thus, it cannot be concluded that the counseling was triggered by the receipt by Colonel True of the document Mr. Mueller had prepared.

M. It is also troubling, as the Charging Party points out that "upper level management started seriously talking about firing Mr. Mueller approximately in late August, either after or near the end of the picketing" (CPBr 22 and 29) and that "documentation" of his file by Mr. Bausano also then began (CPBr 24). However, Mr. Mueller's probationary period ended in November. Colonel True was trying to run an efficient organization, was insisting that all supervisors document employee problems, and was firing those who did not. And as early as

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December 1981, complaints about Mr. Mueller had been registered with his supervisors and documented. See finding 13b, supra. Thus, I have considered, but not placed controlling weight on the "juxtaposition of these events" (CPBR 24).

N. The Charging Party dismisses, as "incredible," any suggestion that management had no knowledge of Mr. Mueller's activities "in coordination with AFGE Local 2144" (CPBr 19). As of August 14, when Mr. Mueller appeared on the picket line which was replete with signs naming AFGE as supporting the picketers, I agree. But CE management then learned of other CE employees regularly on the picket line, as well; and nothing adverse happened to them.

O. The Charging Party also challenges the job standards devised by Mr. Bausano for the job of planner. See CPBr 31-33. As devised, it was argued that Mr. Mueller did meet the standard for estimating labor and material costs and utilizing the sign-out board. See GC 4.2 and 3 TR 126-127. I agree that failure to meet these particular standards would not have resulted in the firing of Mr. Mueller and also that Mr. Bausano was too inexperienced to devise accurate standards. However, I do not believe that Mr. Bausano would have "devised the standards solely for [Mr. Mueller]," as the Charging Party argues (CPBr 32).

P. I have also considered the fact that management, as late as May, was telling Mr. Mueller that his performance was "good" and he had a potential for promotion and, as late as October, that rumors of his firing were "unfounded." See findings 5 and 8, supra. As it turned out, these assurances were misrepresentations. However, it is probably not so unusual for supervisors to make such remarks, in the hopes of encouraging employees to do better; and I have therefore not attached significance to them.

Based upon the record made in this case, it is concluded that Respondent was not motivated to terminate Mr. Mueller for any but legitimate reasons. This conclusion renders unnecessary the consideration of other issues raised by the parties.

Ultimate Findings and Recommended Order

The General Counsel has not proved the allegations of the complaint by a preponderance of the evidence.

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Accordingly, and pursuant to 5 CFR 2423.29, it is hereby ordered the complaint in this case be dismissed.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: August 30, 1983
Washington, DC

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. O-NG-610

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, REGION VII,
OFFICE OF HUMAN DEVELOPMENT SERVICES

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents an issue relating to the negotiability of the following Union proposal.

Union Proposal

> Section 4. The "Competitive Area" will be established by the Agency as all of those positions under the personnel administration and authority of the Principal Regional Official of DHHS-Kansas City, MO. within the commuting area of Kansas City, Missouri.1/ [Footnote added.]

The identical proposal (except for the Agency official's title, which by that time, had been changed as indicated in n. 1) was the subject of Authority review in an unfair labor practice proceeding involving the same parties as are involved in the instant negotiability appeal. In the unfair labor practice case, Department of Health and Human Services, Washington, D.C., and Department of Health and Human Services, Region 7, Kansas City, Missouri and National Treasury Employees Union, 16 FLRA No. 44 (1984), the issue presented, insofar as is relevant herein, was whether negotiation on

1/ It appears from the record that the title of the Agency official named in the proposal has been changed to "Regional Director."

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the proposal was barred by an Agency regulation for which a compelling need was asserted. The Authority found that the Agency had failed to establish that there existed a compelling need for the cited Agency regulation to bar negotiation over the disputed proposal and consequently ordered bargaining over the proposal.

At about the same time as the filing of the instant petition for review, the Union also filed the unfair labor practice complaint, culminating in the decision cited above, and requested that processing of the negotiability appeal be suspended pending resolution of the unfair labor practice dispute. Upon issuance of the decision in the unfair labor practice case, the Agency was invited to submit its statement of position in accordance with section 2424.6 of the Authority's Rules and Regulations.

In its statement of position, the Agency again asserts that the proposal is nonnegotiable, but on grounds different from those advanced in the unfair labor practice proceeding.2/ The Agency now asserts, without contravention,3/ that the competitive area proposed by the Union includes employees and personnel excluded from the Union's bargaining unit by operation of section 7112(b) of the Statute and also encompasses employees in a certified bargaining unit represented by another union. In light of the situation described, the disputed proposal is to the same effect as the proposal in American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984) which also sought to establish a competitive area including non-bargaining unit employees. The Authority concluded, with respect to the proposal in the cited case, that to the extent it "would directly determine conditions of employment of nonunit employees, it concerns matters beyond the representation rights of the Union and is not within the Agency's obligation to bargain." Thus, based on Office of Personnel Management, and the reasons and cases cited therein, the Union Proposal herein is not within the Agency's duty to bargain.

2/ In n. 5 of the cited unfair labor practice case, the Authority notes that the Agency herein did not allege in that case that the proposal applied to employees outside the bargaining and, hence, that question was not considered by the Authority.

3/ The Union filed a letter, dated December 7, 1984, stating its view that issues raised in the instant negotiability appeal were adjudicated in the above referenced unfair labor practice decision. Therefore, it saw "no need for the Authority to continue processing the instant negotiability petition." However, the letter did not contain an express withdrawal of the petition and processing continued. Thereafter, the Union did not file a reply brief addressing the arguments advanced by the Agency in its Statement of Position.

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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17 FLRA No. 88

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEALTH CARE FINANCING
ADMINISTRATION

Agency

and

Case No. 0-AR-428

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Arnold Ordman filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter of whether the grievant was entitled to a retroactive temporary promotion was submitted to arbitration pursuant to a grievance procedure negotiated by the parties. Apart from this procedure there was no collective bargaining agreement in effect between the parties during the time material to this matter. The Arbitrator determined that the grievant had performed the duties of a higher-grade position for more than 120 days without the approval of the Office of Personnel Management (OPM) and that at such time under the rationale of the decisions of the Comptroller General in Turner - Caldwell, 55 Comp. Gen. 539 (1975), aff'd on reconsideration 56 Comp. Gen. 427 (1977), the Agency's practice was to grant claims for retroactive temporary promotions of employees who had been detailed to a higher-grade position for more than 120 days without prior OPM approval. Accordingly, despite the order of the court in Wilson v. U.S., No. 324-81C (Ct. Cl. Oct. 23, 1981), issued before the hearing and submitted to the Arbitrator, the Arbitrator awarded the grievant a retroactive temporary promotion with backpay for the period of time in which the grievant's detail exceeded 120 days.

In one of its exceptions the Agency essentially contends on the basis of the order in Wilson that the award is deficient because the Arbitrator's award of a retroactive promotion and backpay is not

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authorized by either applicable law and regulation pertaining to details or the Back Pay Act, 5 U.S.C. § 5596. The Authority agrees.

In Wilson v. U.S. the plaintiff federal employee had sought on the basis of the Turner - Caldwell decisions of the Comptroller General a retroactive temporary promotion and backpay for an alleged extended detail to a higher-grade position. In the Turner - Caldwell decisions the Comptroller General had essentially held that the remedy for an agency's failure to obtain the required prior approval to extend a detail to a higher-grade position beyond 120 days was a temporary promotion and backpay for the aggrieved employee retroactive to the 121st day of the detail. Rejecting those decisions of the Comptroller General, the Court of Claims held that neither the statutory and Federal Personnel Manual provisions limiting details to 120 days, 5 U.S.C. § 3341; FPM chaps. 300, 335, nor the Back Pay Act authorizes a retroactive temporary promotion with backpay for a detail to a higher-grade position for more than 120 days when the required approval of OPM is not obtained. Subsequently, the Comptroller General overruled the Turner - Caldwell decisions and stated that Wilson would be followed in all pending and future claims. Turner-Caldwell, 61 Comp. Gen. 408 (1982). Thus, in terms of this case where the Arbitrator's award was issued after both the order in Wilson and the overruling of the Turner - Caldwell decisions by the Comptroller General, the Authority finds that the award is contrary to law and regulation pertaining to extended details and is contrary to the Back Pay Act. The Authority further finds that with no collective bargaining agreement between the parties and with no apparent agency regulation mandating promotions, the Arbitrator's award is not otherwise authorized by his acknowledgment of the Agency's compliance at the time of the grievant's detail with the Turner - Caldwell decisions. Cf. U.S. Department of Justice, Immigration and Naturalization Service and National Immigration and Naturalization Service Council, American Federation of Government Employees, Local 2805, 15 FLRA No. 163 (1984) (in which the Authority stated that it had not been shown that Wilson precludes an arbitrator from appropriately awarding backpay to remedy a violation of a provision of a collective bargaining agreement); 61 Comp. Gen. 403 (1982) (in which the Comptroller General held that a violation of a provision in an agency regulation making temporary promotions mandatory for details to higher-grade positions after 60 days was compensable under the Back Pay Act). Accordingly, the award is set aside.*/

Issued, Washington, D.C., April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision it is not necessary to address the Agency's other exceptions.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and

Case No. 9-CA-855

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of the complaint with respect to them. Thereafter, the Respondent and the General Counsel filed exceptions to the Judge's Decision, and the General Counsel filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, except as modified herein.

The Judge found that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing certain changes in the work assignments of unit employees before bargaining in good faith with the Charging Party (AFGE) concerning the impact and implementation of those changes had been completed. Noting the absence of exceptions to this finding, the Authority agrees, for the reasons stated by the Judge.

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The record further shows that on January 30, 1981, one of the Respondent's supervisors, Dillon, held a meeting with four clerk-typists to announce the changes in work assignments, to distribute the Respondent's memorandum setting forth those changes, and to instruct the employees how to proceed. The Judge found that in addition to its refusal to bargain, the Respondent also violated section 7116(a)(1), (5) and (8) of the Statute,[1/] as the meeting was a "formal discussion" within the meaning of section 7114(a)(2)(A) of the Statute, and the Respondent had not afforded AFGE prior notice and an opportunity to attend the meeting.[2/]

1/ Section 7116(a)(1), (5) and (8) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this Chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

. . . . . .

(8) to otherwise fail or refuse to comply with any provision of this Chapter.

2/ Section 7114(a)(2)(A) provides:

§ 7114. Representation rights and duties

. . . . . .

(a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

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We disagree. The Authority has recently held, in Bureau of Government Financial Operations, Headquarters, 15 FLRA No. 87 (1984), that in order for the right of an exclusive representative to be represented at a formal discussion to attach, all elements set forth in section 7114(a)(2)(A) must be found to exist: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more employees in the unit or their representatives; (4) concerning any grievance or any personnel policy or practices or other general conditions of employment. In the circumstances of this case, without passing on the other elements, the record does not establish that the meeting was formal in nature within the meaning of section 7114(a)(2)(A) of the Statute. Thus, the meeting in question was held at the employees' workplace, was spontaneously called, was conducted alone by a first-level supervisor, was only about ten minutes in duration, and had no formal agenda. Accordingly, the Authority finds that as the General Counsel has failed to establish that the meeting in question was "formal" in nature within the meaning of the Statute, the Respondent cannot be found to have violated section 7114(a)(2)(A), and we shall dismiss the allegations of the complaint in this regard. See Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115 (1982); Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco Region, 10 FLRA 120 (1982); Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C., 12 FLRA No. 107 (1983). Further, the Authority specifically does not adopt the Judge's finding, at note 14 of his Decision, that the Respondent's actions in this matter constituted a clear bypass of the union in violation of section 7116(a)(5) of the Statute. In our view, announcing the changes in the context of the meeting in question did not constitute an attempt to deal directly with unit employees concerning their conditions of employment or to undermine the status of the Union as the exclusive representative of the employees. See Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA No. 78 (1984).

With regard to the further allegation that the Respondent violated section 7116(a)(1) of the Statute by virtue of certain statements to a union representative, the Judge found that on February 2, 1981, supervisor Dillon approached Chappell at her desk and asked to speak with her privately. Instead, Chappell initiated a debate in the presence of other employees regarding her right as a union representative to have been informed of the meeting in question and to attend all meetings with employees, and Dillon responded by criticizing Chappell for not having waited until after the meeting to discuss the matter. The Judge found, and the Authority agrees, that the remarks of Dillon under the circumstances cannot reasonably be construed as tending to have had a

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chilling effect on Chappell or the employees who were present, and we shall dismiss the allegations of the complaint in this regard.3/ See, e.g., Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA 766, 778 (1982).

As a remedy for the section 7116(a)(1) and (5) violation found above, the Judge recommended that the Authority order the Respondent to cease and desist from "implementing changes in the working conditions of employees" and to "rescind the changes in employees' work assignments implemented February 2, 1981." The Authority concludes that such a status quo ante remedy is not warranted in the circumstances of this case. The record shows that the assignments were temporary in nature and had all been discontinued prior to the hearing in this case. Thus, in these circumstances when a status quo ante remedy would be meaningless,4/ the Authority concludes that a prospective bargaining order should fully remedy the refusal to bargain violation found herein.

ORDER

Pursuant to section 7118 of the Statute and section 2423.29 of the Authority's Rules and Regulations, the Authority hereby orders that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland shall:

1. Cease and desist from:

(a) Implementing changes in the working conditions of its employees at its Field Support Unit Office without first affording the American Federation of Government Employees, AFL-CIO, the employees' exclusive bargaining representative, an opportunity to negotiate, upon request, with respect to the procedures which management will observe in implementing such changes and concerning appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

(2) Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

3/ In so finding, however, we find it unnecessary to pass upon, and do not adopt, the Judge's characterization of Chappell's actions at the January 30th meeting.

4/ In view of this conclusion, the Authority finds it unnecessary to apply an analysis of the factors enumerated in Federal Correctional Institution, 8 FLRA 604 (1982).

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(a) Post at its Field Support Unit Office, 620 Folsom Street, San Francisco, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Assistant Regional Commissioner for Field Operations, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the remaining allegations of the complaint in Case No. 9-CA-855 be, and they hereby are, dismissed.

Issued, Washington, D.C., April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes in the working conditions of our employees at the Field Support Unit Office without first affording the American Federation of Governmnt Employees, AFL-CIO, the employees' exclusive bargaining representative, an opportunity to negotiate, upon request, with respect to the procedures which management will observe in implementing such changes and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IX, Federal Labor Relations Authority, whose address is: 530 Bush Street, Suite 542, San Francisco, California, 94108, and whose telephone number is: (415) 556-8105.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET, NW
WASHINGTON, D.C. 20036

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Respondent	
and	Case No.: 9-CA-855
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

Daniel H. Green
For the Respondent

Stephanie Arthur, Esq.
For the General Counsel

Vince Morgante
For the Charging Party

Before: RANDOLPH D. MASON
Administrative Law Judge

DECISION

Statement Of The Case

This case arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101, et seq., and was initiated by a complaint filed on April 6, 1981, by the Regional Director of the Federal Labor Relations Authority, Region IX, San Francisco, California, against the Department of Health and Human Services, Social Security Administration, Baltimore, Md., ("Respondent").

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The complaint alleges that respondent violated sections 7116(a)(5) and (1) of the Statute by unilaterally implementing certain changes in work assignments before bargaining was completed. It also alleges a violation of §7116(a)(1), (5), and (8), arguing that these changes were announced during a "formal discussion" under §7114(a)(2)(A) and that the union was not afforded an opportunity to be present. Finally, the complaint alleges that respondent violated §7116(a)(1) when a supervisor later "reprimanded" a union representative in front of other employees for having entered the above meeting. Respondent denies all of the above allegations.

A hearing was held in this matter at San Francisco, California, before the undersigned on June 16 and 17, 1981. All parties were represented and afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. The parties filed briefs which have been duly considered. Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits, stipulations, and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions of law, and recommended order:

Findings of Fact

At all times material hereto, the American Federation of Government Employees, AFL-CIO ("union") was the exclusive representative of certain employees in Region IX, San Francisco, Bureau of District Office Operations, Social Security Administration, Department of Health and Human Services. The alleged violations occurred at respondent's Field Support Unit.

The Refusal to Bargain

During the period in question, Respondent's Field Support Unit processed SSI cases before and after they were heard by administrative law judges. About 15 GS-10 claims authorizers reviewed these cases for payment purposes. Other employees at the GS-5/6 level located folders prior to hearings. The clerical and mailroom duties were performed by GS-3/4 clerk typists.

On or about January 19, 1981, one clerk typist and one part-time "work study student" at the Field Support Unit resigned, leaving a shortage in the clerical typing pool. On January 26, Isaac Williams, the respondent's manager, decided that since he could not rehire due to a hiring freeze, he should assign the mailroom clerk to the typing pool, and use the GS-10 claims authorizers to perform the mailroom duties. He also decided to eliminate the clerical "pool" by assigning each of three clerk typists (including the one who had previously worked in the mailroom) to a

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separate group of five named claims authorizers.[1] Previously, the clericals had handled any work given to the typing pool by any of the 15 authorizers. On January 26, 1981, Williams sent his proposed changes to the union. The memorandum was entitled "Emergency Request for Consultation at Your Earliest Possible Convenience; Proposal for change -- effective date 02-06-81." (This was a typographical error; the effective date should have read "February 2, 1981.") After explaining the changes in the typing pool, the memorandum addressed the issue of mail preparation as follows:

> Claims examiners [authorizers] will be responsible for the preparation/distribution of the incoming/outgoing mail. The responsibility will be rotated on a weekly basis and claims examiners will not be expected to take their "fair share" [i.e. regular daily case assignments] during their tour of duty in the mail room.
>
> Preparation of the mail will not include lifting of mail bags or transport of the mail outside the mail room . . . .

The memorandum included a schedule in which each claims authorizer was assigned mailroom responsibilities for a specified one-week period. The first authorizer was assigned the "week of Feb. 02." The last of the 15 authorizers was assigned the week of May 11; thus the schedule covered a 15 week period. Under this plan each authorizer would work in the mailroom for one week every 15 weeks.

On January 29, 1981, at 2:00 p.m. Williams met with union representatives Gayla Chappell and Kathy Rothero to negotiate the proposed changes. The union rejected the respondent's proposals and submitted a written list of seven counter-proposals. Essentially, the union proposed to retain the status of the typing pool as it presently existed and to eliminate the shortage in the pool by borrowing a clerical employee who had been assigned to the folder location section. The latter function would be performed by a work-study student. By eliminating the shortage in the typing pool in this manner, the mailroom function would continue to be performed by clerk-typist Joel Monkarsh, and the claims authorizers would not be required to work in the mailroom. Williams rejected all of the above counter-proposals.[2]

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[1] He wanted to eliminate the pool because he felt one clerical was not doing his share of the workload.

[2] However, he did ultimately accept, in part, two other proposals made by the union concerning the manner in which the "fair share" of new cases are received, "queried," and distributed by the clericals to the claims authorizers.

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During the course of the January 29 negotiating session the union emphasized that the assignment of mailroom duties to claims authorizers and the elimination of the typing pool would have serious adverse effects on the employees. The union contended, inter alia, that the claims authorizers would be affected, in part, as follows: (1) the proposal would impede their ability to perform their regular claims work and thus result in lower appraisals and performance audits; (2) the performance of GS-3 mail duties could result in downgrading the GS-10 claims authorizer position; and (3) some of the authorizers were physically incapable (due to arthritis, etc.) of performing certain mailroom duties such as opening heavy mailbags, and others would find it difficult to stand and bend for several hours. Williams, on the other hand, took the position that the employees would not be adversely affected. With specific regard to the union's second point, he stated that he had spoken with the regional personnel department and had been told that his proposal would not cause a downgrading. The union stated that it would be necessary to have the latter assurance in writing to protect the authorizers. The union also stated that it would be necessary for the parties to devise methods to ensure that the performance audits and appraisals of authorizers took into consideration the fact that time had been spent away from their regular claims duties when they were in the mailroom. They were convinced the delays during the mailroom duties would adversely affect their regular case work. None of the above matters were resolved during the meeting.

The union also made it clear that if respondent insisted on making the authorizers perform mailroom duties, appropriate arrangements would have to be negotiated for employees who were physically incapable. Although there was some discussion about having two authorizers work in the mailroom at the same time, this question was not resolved.

The union also argued that the clerk-typists would be adversely affected by eliminating the typing pool. Under the pool concept, each typist had handled up to his or her capacity, whereas the new system might result in one or more typists accumulating a large backlog. Although no specific proposal was made at the time, the union indicated that a procedure would have to be worked out for the re-assignment of these backlogs. Williams evaded this discussion by changing the subject. When the union stated that such backlogs could have an adverse effect on appraisals and performance audits, Williams simply disagreed.

After about 45 minutes of discussion, Williams indicated that the session was over. The union representatives told him that further negotiating would be necessary since many issues had not yet been resolved.

Later that same day, Thursday, January 29, Williams told the supervisors for the authorizers and clerk-typists to inform the employees and implement the plan on Monday, February 2, 1981.

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Early the next morning, Friday, January 30, union representative Chappell told Williams that she wanted to continue the negotiations started on the previous day and she requested official time for that purpose. Williams responded that the negotiations were over and that he was going to implement the changes.3/ Chappell protested that there were still a number of issues to discuss concerning both the substance and the impact of the proposals. Thereafter Chappell immediately prepared a memorandum to Williams in which she requested further bargaining and stated that at the January 29 meeting she had initiated bargaining on the substantive issues as well as the impact and implementation of Williams' proposed changes. She stated that she was available to meet with him that day as well as the following week.4/ In accordance with customary procedure, she placed the memorandum in Williams' mailbox at about noon, but he did not notice it until he checked his mailbox late that afternoon when Chappell had already gone for the day. On Monday, February 2, Williams implemented his proposed changes without further negotiation. There was no pressing need to eliminate the typing pool and a brief delay in implementation of the remainder of his plan would not have been an undue burden on the office. After 15 weeks, the authorizers were no longer required to work in the mailroom.

The Alleged "Formal Discussion"

On Friday, January 30, Marge Dillon, the supervisor for the clerk-typists, called a meeting of four clerk-typists to announce the changes made by Williams, to instruct them how to proceed, and to distribute a memorandum setting forth these changes.5/ Her comments included the elimination of the typing pool and assignment to individual claims authorizers. The memorandum stated that the changes would be effective on

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3/ Williams told Chappell that he had heard there might be a question about whether the authorizers wanted to work in pairs in the mailroom, and that he was still willing to discuss that single issue if the union desired to do so. He was willing to accomodate the employees, if possible, on this issue.

4/ At this point the union was still under the impression that Williams was not going to implement until Friday, February 6, due to the typographical error in Williams' January 26 memorandum. I reject Williams' testimony that he told the union on January 29 and 30 that he was going to implement his plan "on February 2." Williams was also unaware of this error, and assumed the union knew he would implement his changes on Monday, February 2, 1981.

5/ The supervisor of the claims authorizers did not call a meeting and merely announced the changes in a memorandum.

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Monday, February 2, 1981. After announcing the above changes, Dillon gave one of the employees, Brenda Lowe, a special assignment which affected Lowe only.[6] The meeting lasted about ten minutes; the employees did not ask any questions or make any comments.[7]

The above meeting was held in the back of the office. The union had not been invited to attend. When union representative Chappell (a claims authorizer) saw that the above meeting was in progress, she "walked into the meeting to observe what was going on." Dillon asked what Chappell wanted. Chappell stated: "I have a right to be here as a union representative. You can't hold meetings without the union present." Dillon explained that this was just a "training session" concerning the memorandum she had distributed to the clerical employees. She gave Chappell a copy of the memorandum and told her she could stay. Chappell then said: "It appears from this that you're discussing changes that I have not reached agreement on with the manager." Dillon responded that Williams had told her to inform the employees of the changes. At that point Chappell had to leave to answer a telephone call, and when she returned, the meeting was over.

The February 2 Confrontation

On February 2 Chappell was sitting at her desk when Dillon approached her and said she wanted to talk privately to Chappell outside the work area. Chappell immediately became defensive because she assumed that she was going to be disciplined. She asked what Dillon wanted to discuss. Dillon stated that it concerned "your disrupting[8] the meeting on Friday." Chappell said she couldn't discuss it that day because her union representative was on leave. She added, in a loud voice however, that she had the right to attend all meetings with employees and that Dillon had committed an unfair labor practice by failing to invite the union to the

---

[6] Lowe worked in a different section away from the other clericals and was now given the additional duty of answering the telephone at the front desk for two hours a day.

[7] Chappell testified that during her absence from the meeting Lowe had asked for more details about her special assignment; however, she based her testimony on hearsay which she herself characterized as "pretty vague." I have relied upon the credible testimony of Marge Dillon that no questions were asked or comments made by employees.

[8] Chappell testified that Dillon used either the word "interrupt" (Tr. 47; 80) or "disrupt" (Tr. 81) whereas Dillon only recalled using the word "disrupt."

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meeting on January 30. Dillon raised her voice in response to this accusation and said that the meeting had only been a training session and that Chappell had no right to be there. She also said that Chappell should have waited to talk to Dillon after the meeting, and if Chappell did not like it she could file an unfair labor practice charge. Soon thereafter Chappell said she now wanted her union representative present during further discussion; Dillon agreed and the meeting was terminated since the representative was not available. Several employees were sitting nearby and heard the conversation.

Conclusions of Law

The Refusal to Bargain

The first issue for consideration is whether respondent refused to complete bargaining with respect to the impact and implementation of its decision to have claims authorizers work in the mailroom and to eliminate the typing pool and then unilaterally implemented this decision. The General Counsel alleges that Williams, respondent's manager, violated §7116(a)(5) and (1) when he refused to bargain about these issues as required by sections 7106(b)(2) and (3) of the Statute. Respondent takes the position that on January 29, 1981, Williams fully discussed all issues raised by the union and either reached an agreement or came to an impasse on all issues. Thus respondent contends that Williams was fully justified when, on January 30 he refused to engage in further bargaining with the union.

The facts of record do not support respondent's position. Although respondent did bargain about some issues raised by the union on January 29, respondent terminated the negotiations after 45 minutes without discussing certain matters raised by the union. At the conclusion of the meeting, the union reminded Williams that certain matters had been raised but not discussed, and that they would have to be negotiated at a later time. For example, during the course of the meeting the union had made it clear that if Williams insisted on having claims authorizers perform mailroom duties, methods would have to be devised under which time spent away from regular duties would be taken into consideration in performance audits and appraisals. Similar impact and implementation issues were raised with respect to the clerk-typists.

On the morning of January 30, the union representative told Williams that she wanted to continue the negotiations started on the previous day. Williams said that the negotiations had been completed and that he was going to implement his plan. The union representative protested that there were still a number of issues to discuss concerning both the substance and the impact of the proposals. Later that day she repeated her request in a memorandum to Williams. Nevertheless, respondent implemented the plan on January 30 and February 2, 1981, without permitting further negotiations.

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Section 7103(a)(12) defines collective bargaining and requires that the parties meet at reasonable times and bargain in a good-faith effort to reach agreement with respect to conditions of employment. Here management arbitrarily decided that 45 minutes of bargaining in one meeting on January 29 fulfilled respondent's obligation under the Statute. When the union requested further bargaining the next day, respondent knew full well that the union had certain specific matters concerning appropriate arrangements for adversely affected employees and the manner of implementation of the changes about which it wanted to negotiate. Respondent's refusal to negotiate at this point, and the subsequent unilateral implementation, clearly constituted a violation of section 7116(a)(5) and (1) of the Statute.9/

Formal Discussion

The next issue for consideration is whether respondent violated section 7114(a)(2)(A) by failing to notify the union of its January 30 meeting with the clerk-typists and afford the union an opportunity to attend. That section provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at - -
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment . . . .

It is clear that the meeting in question was "formal" in nature and respondent does not seriously dispute this. A more troublesome question is whether the meeting constituted a "discussion" in view of the fact that supervisor Dillon was the only person who spoke. She merely announced the changes that were going to occur, i.e. the elimination of the typing pool and assignment to individual claims authorizers, and explained how the new operation would be structured. The employees merely listened to the announcement and instructions.

9/ Respondent could have negotiated on Friday, January 30 before the ultimate implementation on Monday, February 2; moreover, if it became necessary, the effective date could have been postponed for a brief period without unduly interfering with the efficient operation of the respondent activity.

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The Statute, as applied to the instant case, requires a "discussion between" the supervisor and one or more employees. This phrase is commonly understood as a conversation in which two or more parties participate; it does not appropriately describe an announcement to a group. Furthermore, although the word "discussion" is sometimes used to describe the comments of an individual, it usually contemplates a debate or argument between two or more persons. Webster's New World Dictionary (2nd Ed. 1970). Thus to conclude that the announcement in the instant case constitutes a "discussion between" Dillon and her employees constitutes a strained interpretation of the Statute. However, section 10(e) of Executive Order 11491, the predecessor of section 7114(a)(2)(A), also required the opportunity for representation at "formal discussions between management and employees," and the Assistant Secretary did not require the participation of the employees in the "discussion." U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, 3 A/SLMR 290, A/SLMR No. 278 (1973) (employee refused to participate); Department of Health, Education and Welfare, Region IX, San Francisco, California, 8 A/SLMR 1273, A/SLMR No.1156 (1978).10/ Nor did he require that such conversations constitute an attempt to bargain or negotiate with the employees for §10(e) to apply. Rocky Mountain Arsenal, Denver, Colorado, 7 A/SLMR 982 (1977). Under §7135 of the Statute, I am constrained to follow the Assistant Secretary's view since "decisions issued under Executive Order 11491 . . . shall remain in full furce and effect . . . unless superceded" by the Statute, regulations, or Authority decisions.11/ Thus I must conclude that the January 30 meeting constituted a "formal discussion."12/

10/ I recognize that the subject matter of the discussion in the latter case would not meet the statutory requirement of a "general condition of employment", Department of Defense, U.S. Navy, Norfolk Naval Shipyard, 1 FLRA 240 (1979), but the holding as to whether a "discussion" occurred has not been overruled.

11/ Although the question was not addressed, it appears that the Authority may have already accepted this view sub silentio in Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA No. 22 (1981) where an announcement was made and no employee participation was noted.

12/ In reaching this conclusion, I have been constrained to respectfully disagree with the result reached by my colleagues: National Archives, Case No. 3-CA-993, OALJ-81-139 (July 21, 1981) (Judge Dowd); Bureau of Field Operations, Social Security Administration, San Francisco, California, 9-CA-372, OALJ-81-145 (July 27, 1981) (Chief Judge Fenton); Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 6-CA-210, OALJ-81-121 (Judge Chaitovitz); U.S. Environmental Protection Agency, Case No. 3-CA-1538, OALJ-81-119 (Judge Sternburg).

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Respondent contends that the subject matter of the meeting did not concern a "general condition of employment."[13] I disagree. The elimination of the typing pool and the concomitant assignment of clerk-typists to individual claims authorizers affected the working conditions of these unit employees generally. This change affected all clerk-typists and claims authorizers to whom the former were assigned; respondent's argument that the discussion only involved minor operational changes peculiar to a few individual employees finds no support in the record.

Since respondent failed to give the union notice and an opportunity to attend the entire discussion as required by §7114(a)(2)(A), I conclude and hold that respondent violated §7116(a)(8), (5)[14] and (1) of the Statute.

February 2 Confrontation

The final issue for consideration is whether Dillon's remarks to union representative Chappell on February 2 tended to have a chilling effect on several unit employees in violation of §7116(a)(1). That section prohibits an agency from interfering with, restraining, or coercing any employee in the exercise by the employee of his protected statutory rights. Section 7102 gives each employee the right to form, join, or assist any labor organization.

On January 30, although she had not been invited, Chappell entered a formal meeting being conducted by Dillon with employees. Chappell brought the meeting to a halt by complaining that she had not been invited and that the failure to do so constituted an unfair labor practice. Dillon gave Chappell a copy of the memorandum she had given the employees concerning the meeting and invited Chappell to stay. Chappell further complained that the meeting itself was improper since she had not finished bargaining on the changes that were being announced. Dillon responded that she had been told by the manager to hold this meeting.

---

[13] It is not alleged that any grievance, personnel policy or practice was involved.

[14] Since respondent's unilateral change constituted a clear bypass of the union, and therefore a refusal to bargain, §7116(a)(5) was violated; I need not decide whether a §7116(a)(5) violation could have been based solely on the §7114(a)(2)(A) violation. See, Department of Health, Education and Welfare, 5 FLRA No. 58 (1981).

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The following Monday, February 2, Dillon approached Chappell at her desk and, since other employees were present, asked to speak to her privately. Chappell insisted on knowing what Dillon wanted to discuss. Dillon said "it concerns your disrupting the meeting on Friday." Chappell then loudly contended that she had a right to attend all meetings with employees. Dillon argued that this was merely a "training session" and that Chappell had no right to attend; she further stated that Chappell should have waited to talk to her after the meeting and that if she disagreed she could file an unfair labor practice charge.

Chappell's insubordinate actions at the January 30 meeting clearly constituted an improper means of asserting her statutory rights. Indeed, the union did have a right to be given an opportunity to attend under §7114(a)(2)(A), but the Statute does not give the union a license to cause disruption at such formal meetings with employees in a manner demeaning to a supervisor. Thus it is not surprising that Dillon wanted to inform Chappell that she disapproved of the disruption. Dillon chose not to say anything disparaging at the January 30 meeting and, in fact, invited Chappell to stay. On February 2 Dillon asked to speak privately with Chappell but the latter forced a public confrontation. Chappell raised her voice and argued she had a right to attend such meetings and Dillon took an opposing point of view. This was simply a legal argument which did not tend to have a chilling effect on Chappell or the employees who were listening. Moreover, Dillon's disapproval of Chappell's "disrupting" the meeting, in the context of this conversation, did not tend to have a chilling effect. The word "disrupt" was a mild choice of words to describe Chappell's behavior. Although that word tended to cast Chappell in a slightly negative light, in the same conversation Dillon showed respect for Chappell's statutory right to have her union representative present and urged her to follow the statutory unfair labor practice procedure. Under all these circumstances, Dillon's remarks would not have tended to cause the employees to refrain from exercising their statutory rights. Therefore I find no independent violation of §7116(a)(1).

In view of the foregoing I recommend that the Authority adopt the following:

ORDER

Pursuant to 5 U.S.C. §7118(a)(7) and §2423.26 of the Final Rules and Regulations, 45 Fed. Reg. 3482, 3510 (1980), it is hereby ORDERED that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, shall:

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1. Cease and desist from:

(a) Implementing changes in the working conditions of employees at the Field Support Unit office prior to completing negotiations with the American Federation of Government Employees, the exclusive representative of employees at the Field Support Unit, concerning the impact and implementation of the change.

(b) Holding or conducting formal discussions with bargaining unit employees concerning changes in general working conditions without first providing, by appropriate advance notice, the exclusive representative, American Federation of Government Employees, an opportunity to be represented as such formal discussions.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to carry out the ırposes and policies of the Federal Service Labor-Management Relations :atute:

(a) Rescind the changes in employees' work assignments implemented February 2, 1981, and restore the assignments in effect prior thereto.

(b) Meet and negotiate, upon request, with the Union regarding the impact and implementation of the proposed changes in working conditions of employees at the Field Support Unit to the extent consonant with the Statute and regulations.

(c) Post at the Field Support Unit Office, 620 Folsom Street, San Francisco, California, copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Assistant Regional Commissioner for Field Operations, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Said officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, 530 Bush Street, Suite 542, San Francisco, California 94108, in writing, within 60 days from the date of this order as to what steps have been taken to comply herewith.

RANDOLPH D. MASON
Administrative Law Judge

Dated: September 28, 1981
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT unilaterally implement changes in the working conditions of employees at the Field Support Unit, Social Security Administration, prior to completing our negotiations with American Federation of Government Employees, the exclusive representative of employees at the Field Support Unit, concerning the impact and implementation of the change.

WE WILL NOT conduct formal discussions with employees at the Field Support Unit concerning changes in their general working conditions without first providing the American Federation of Government Employees, the exclusive representative, notice and the opportunity to be represented at such formal discussions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by the Statute.

WE WILL rescind the changes in employees' working conditions implemented February 2, 1981, and restore assignments in effect prior thereto until we have negotiated to the extent consonant with law and regulations with the American Federation of Government Employees regarding the impact and implementation of said changes.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region IX, the Federal Labor Relations Authority, whose address is: 530 Bush Street, Suite 542, San Francisco, California, 94108, and whose telephone number is: (415) 556-8105.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES,
LOCAL 1437

Union

and

Case No. 0-NG-447

U.S. ARMY ARMAMENT RESEARCH
AND DEVELOPMENT COMMAND,
DOVER, NEW JERSEY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of two Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

Article XXIV
Arbitration Procedure

Section 2 - Scope: If the decision on a grievance processed under the negotiated grievance procedure is not satisfactory to one of the parties, the union, the employee, or the employer may refer the issues to arbitration following the procedures and requirements of this article. [Only the underlined portion of the proposal is in dispute.]

Union Proposal 2

Article XXII
Grievance Procedure

Section 4 - Action/Remedy: A grievance not satisfactorily settled at the Third Step may be referred

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to arbitration as stipulated in Article XXIV only by the Union or the Employer. If the Union or the Employer do not invoke arbitration for whatever reasons, the employee will be considered "to have exhausted his/her administrative remedies." [Only the underlined portion of the proposal is in dispute.]

Based upon the language of the proposals and the record in the case, both proposals purport to deal with circumstances in which an individual employee's grievance is not resolved in the negotiated grievance procedure to the satisfaction of that employee and neither the Union nor the Agency invokes arbitration.1/ As a course of action in such circumstances, Union Proposal 1 would provide that the employee may invoke arbitration on his or her own behalf. Union Proposal 2, alternatively, would provide that, while only the Union or the Agency may invoke arbitration, the failure of either party to do so would mean that the employee has exhausted his or her contractual remedies for purposes of appeal to a Federal court. That is, the proposal is intended to facilitate the individual employee's attempt to obtain court review of an action brought under the negotiated grievance procedure.

As to Union Proposal 1, the Agency contends that by providing for an individual employee to invoke arbitration, the proposal is nonnegotiable under section 7117(a)(1) of the Statute2/ because it it inconsistent with law, i.e., section 7121(b)(3)(C) of the Statute.3/ Specifically,

1/ Union Petition for Review at 2.

2/ Section 7117(a)(1) provides:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

3/ Section 7121(b)(3)(C) provides:

§ 7121. Grievance procedures

. . . . .

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(Continued)

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the Agency argues that section 7121(b)(3)(C) provides for only the exclusive representative or the agency to invoke arbitration and thereby precludes individual employees from doing so. The Authority agrees.

In this regard, section 7121(b)(3)(C) of the Statute provides that "either the exclusive representative or the agency" may invoke arbitration. It does not also provide that individual unit employees may invoke arbitration. Thus, the question is whether Congress intended to limit the right to invoke arbitration solely to the exclusive representative or the agency so as to preclude negotiation of such a right for individual employees acting on their own behalf.

The legislative history of the section supports the conclusion that this is the implication Congress intended. The language of section 7121(b)(3)(C) is that of the House bill (H.R. 11280), i.e., the "Udall substitute," but it is unchanged from the bill as it was reported by the House committee. The Report which accompanied the House committee bill[4/] merely restates the language of the section.[5/] The Senate bill (S. 2640) contained a similar provision, § 7221(c), which provided, in part, that "[a]rbitration may be invoked only by the agency or the exclusive representative." [Emphasis added.] The Report accompanying that bill emphasized the intent that the right to invoke arbitration was solely and exclusively that of the union or the agency:[6/]

> Subsection (c) provides that a negotiated grievance procedure must provide for arbitration as the final step of the procedure. This contrasts with the provisions of Executive Order 11491 under which the determination as to whether to provide for arbitration was left to

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(Continued)

. . . . .

(3) include procedures that--

. . . . .

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

4/ H.R. REP. NO. 95-1403, 95th Cong., 2nd Sess. 55-6 (1978).

5/ See also 124 CONG. REC. 29185 (1978) (Sectional Analysis of "Udall substitute").

6/ S. REP. NO. 95-969, 95th Cong., 2nd Sess. 110 (1978).

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> negotiation between the parties. However, arbitration can only be invoked by the agency or the exclusive representative. Thus an aggrieved employee does not have a right to arbitration. This maintains the right of an exclusive representative to refuse to take to arbitration any grievance which it, in good faith, believes should not be processed through to arbitration so long as it meets its representational responsibilities under this subchapter. . . . [Emphasis added.]

Further, the Report of the Conference Committee[7/] does not identify or allude to any conflict between the House and Senate bills in this regard, suggesting that the House was in accord with the Senate's more specific statement of intent as to an individual employee's right to arbitration.

Moreover, the language and legislative history of section 7121 as a whole lend additional support to the conclusion Congress intended individual employees to have no right to invoke arbitration. In particular, while section 7121(b)(3)(B) specifically provides for individual employees to present grievances on their own behalf, Congress did not, in section 7121(b)(3)(C) extend that right to arbitration. Read together, sections 7121(b)(3)(B) and 7121(b)(3)(C) clearly indicate that the employee's right to present grievances applies only to the steps of the grievance procedure prior to arbitration. Furthermore, the legislative history of section 7121(b)(3)(B) indicates that this right is a narrow exception to the right, and responsibility, of the exclusive representative to present grievances of unit employees under the negotiated grievance procedure. As the Authority found in National Federation of Federal Employees, Local 1001 and Department of the Air Force, Vandenberg Air Force Base, California, 15 FLRA No. 154 (1984) (Union Provision 1), with the exception of employees' right to present grievances on their own behalf, the basic underlying policy of section 7121 is that "only the exclusive representative, and no other, may represent unit employees under the negotiated grievance procedure." [Emphasis in original.] Vandenberg Air Force Base, at 5 of slip opinion. That is, the Authority determined that, with the stated exception, section 7121 precluded an employee from having any representative but the exclusive representative in the negotiated grievance procedure. Thus, the Authority found in that case that a proposal providing for employees to select a personal representative to present their grievances in the negotiated grievance procedure was nonnegotiable because it was inconsistent with section 7121(b)(3) and section 7114(a)(5) of the Statute.

Thus, based upon the language and legislative history of section 7121 as a whole, and of section 7121(b)(3)(C) in particular, the Authority concludes that, under section 7121(b)(3)(C), only the exclusive representative or the agency, and no other, may invoke arbitration and,

7/ H.R. REP. NO. 95-1717, 95th Cong., 2nd Sess. (1978).

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therefore, a proposal providing individual unit employees a right to invoke arbitration is precluded by the Statute. Consequently, Union Proposal 1 is inconsistent with section 7121(b)(3)(C) of the Statute and, under section 7117(a)(1) of the Statute, is outside the Agency's duty to bargain.

Turning to Union Proposal 2, as indicated above, it concerns an alternative course of action to that provided by Union Proposal 1 whereby individual unit employees whose grievances are not taken to arbitration by the Union might seek a remedy. The proposal would provide, in essence, that where an individual employee attempts to obtain court review of an action brought under the negotiated grievance procedure, the fact that the Union did not invoke arbitration on behalf of the employee shall constitute an exhaustion of remedies for purposes of establishing the court's jurisdiction. Thus, the proposal is intended to enable an employee to seek court review of an unresolved grievance in the absence of an arbitration award.

However, in thus providing the basis for individual unit employees to seek court review of their grievances, the proposal, as to certain types of grievances, concerns matters which are specifically provided for by Federal statute and, therefore, are expressly excluded from the definition of "conditions of employment" under section 7103(a)(14)(C) and not within the Agency's duty to bargain under the Statute.8/ In particular, as provided in section 7121(e)(1) of the Statute, performance-based actions under 5 U.S.C. § 4303 and adverse actions under 5 U.S.C. § 7512, which also fall within the coverage of the negotiated grievance procedure may, at the option of the aggrieved employee, be appealed to the Merit Systems Protection Board (MSPB) under 5 U.S.C. § 7701 or be raised under the

---

8/ Section 7103(a)(14)(C) provides as follows:

§ 7103. Definitions; application

(a) For the purpose of this chapter--

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

. . . . . .

(C) to the extent such matters are specifically provided for by Federal statute[.]

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negotiated grievance procedure, but not both.9/ Section 7121(f) provides,10/ as to a grievance concerning such actions, that court review may be obtained, in the same manner and under the same conditions as an appeal from a decision by MSPB, where the matter has been the subject of an arbitration award. Thus, once an individual employee initiates a grievance concerning such matters under the negotiated grievance procedure, not only is the employee confined to that procedure,

9/ Section 7121(e)(1) provides:

§ 7121. Grievance procedures

. . . . .

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

10/ Section 7121(f) provides:

§ 7121. Grievance procedures

. . . . .

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

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but the Statute prescribes the manner in which and the conditions under which those matters can be appealed to a court of appropriate jurisdiction. In setting forth the conditions governing court review, the Statute makes no provision for review of employee grievances of performance-based or adverse actions which have not been resolved by an arbitration award. Therefore, under section 7121(f), there is no basis for court review where such matters have been raised under the negotiated grievance procedure, but have not been the subject of an arbitration award. Hence, by providing that the failure of the Union to invoke arbitration on behalf of an employee shall constitute an exhaustion of remedies for purposes of establishing a basis of court review, Union Proposal 2, insofar as it concerns the conditions under which grievances concerning performance-based actions under 5 U.S.C. § 4303 and adverse actions under 5 U.S.C. § 7512 may be appealed to a court of appropriate jurisdiction, pertains to matters which are specifically provided for by Federal statute (i.e., section 7121(f) of the Statute, which provides for appeal from an arbitrator's award with regard to such matters) and, therefore, is expressly excluded from the definition of "conditions of employment" under section 7103(a)(14)(C) and not within the Agency's duty to bargain. See, e.g., National Treasury Employees Union and Pension Benefit Guaranty Corporation, 9 FLRA 692 (1982) (proposal prescribing pay adjustments for General Schedule employees concerns matters specifically provided for by 5 U.S.C. §§ 5332 and 5102, which establish the means for adjusting those rates); International Brotherhood of Electrical Workers, Local 2080, AFL-CIO-CLC and Department of the Army, U.S. Corps of Engineers, Nashville, Tennessee, 10 FLRA 222 (1982) (proposal prescribing conditions under which premium pay may be paid to prevailing rate employees concerns a matter specifically provided for by 5 U.S.C. § 5544). Moreover, in agreement with the Agency, the Authority concludes that, insofar as Union Proposal 2 relates to the determination as to when an employee has exhausted administrative remedies for purposes of invoking judicial review, it is not a matter pertaining to "conditions of employment" within the meaning of section 7103(a)(14) of the Statute.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Union Proposals 1 and 2 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION (MEBA, AFL-CIO)

Union

and

Case No. 0-AR-941

NATIONAL WEATHER SERVICE,
WESTERN REGION

Activity

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to a supplemental award of Arbitrator Janet L. Gaunt filed by the Department of Commerce (the Agency) on behalf of the Activity pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, the Authority is without jurisdiction to review the exceptions and the exceptions therefore must be dismissed.

In this case, the Arbitrator found that the grievant's removal by the Activity resulted from harmful procedural error and unlawful disparate treatment and was not made for reasons that promoted the efficiency of the service. As her award, the Arbitrator, among other things, set aside the removal action and directed the Activity to reinstate the grievant with backpay. The Arbitrator subsequently issued a supplemental award granting the Union's application for attorney's fees. The Agency then filed the instant exceptions to the supplemental award.

Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). . . .

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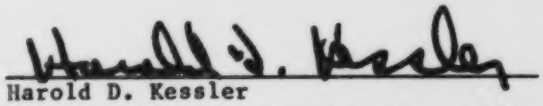
As relevant to this case, the matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which, in turn, applies to specified adverse actions including removals. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Since the Arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions.

Accordingly, and apart from other considerations, the Agency's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C. April 22, 1985



Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARMY AND AIR FORCE EXCHANGE SERVICE
(AAFES), FORT CARSON, COLORADO

Respondent

and

Case Nos. 7-CA-782
7-CA-788
7-CA-795

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1345

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain of the unfair labor practices alleged in the consolidated complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge also found that the Respondent had not engaged in certain other unfair labor practices alleged in the consolidated complaint and ordered that such allegations be dismissed. The General Counsel filed exceptions with respect to the latter portion of the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

The Judge found in Case Nos. 7-CA-782 and 7-CA-788 that the Respondent did not comply with section 7114(b)(4) of the Statute[1/]

1/ Section 7114(b)(4) provides in pertinent part:

§ 7114. Representation rights and duties

. . . . . .

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

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in violation of section 7116(a)(1),(5) and (8) of the Statute by failing to furnish the American Federation of Government Employees, AFL-CIO, Local 1345 (the Union) with necessary data contained in employee James Allen's Official Personnel File (OPF)2/ and by refusing to furnish desk audits for Respondent's branch stores in January 1981.3/ No exceptions were filed in this regard.

Under section 7114(b)(4) of the Statute, an agency has a duty to furnish, upon request by an exclusive representative and to the extent not prohibited by law, data which, among other things, is reasonably available and necessary for full and proper discussion, understanding,

(Continued)

. . . . .

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business; [and]
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]

2/ In agreement with the Judge's finding in Case No. 7-CA-782, the Authority concludes that Respondent's belated disclosure of the necessary data at the hearing does not militate against finding that the Respondent's initial nondisclosure of the data was violative of the Statute. See, e.g., Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pennsylvania, 11 FLRA 639 (1983), (necessary data requested must be furnished in a timely manner under the circumstances in order to effectuate the purposes and policies of the Statute).

3/ In agreement with the Judge's finding in Case No. 7-CA-788, the Authority concludes that, based on the allegations set forth in the complaint, the Respondent had adequate notice of the particular acts alleged to constitute unfair labor practices; indeed, at the hearing, the Respondent in fact defended, inter alia, its refusal to provide the desk audits for the entire facility, and did not limit its defense to the refusal to provide desk audits for the Main Store as alleged in the charge. See United States Army Air Defense Center and Fort Bliss, Fort Bliss, Texas, 12 FLRA 719 (1983); Internal Revenue Service, Chicago, Illinois, 9 FLRA 648, 650 n.3 (1982), enforcement denied as to other matters sub nom. Internal Revenue Service v. Federal Labor Relations Authority, 717 F.2d 1174 (7th Cir. 1983).

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and negotiation of subjects within the scope of collective bargaining. Such data must be necessary to enable the union to fulfill its representational responsibilities, including the effective evaluation and processing of grievances.4/ However, a union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data.5/ The duty to supply data under section 7114(b)(4) thus turns upon the nature of the request and the circumstances in each particular case. The threshold issue in Case No. 7-CA-782 is whether or not the data requested by the Union is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining, including specifically the Union's evaluation and processing of a grievance concerning the selection of employee James Allen for a job vacancy.

In Case No. 7-CA-782, the Union requested the data relied upon by the Respondent in selecting employee James Allen for a job vacancy in order to determine whether to file a grievance. The record reveals that selecting officials generally use a "supervisor rating form" in evaluating applicants for a vacancy such as the one involved herein. The selecting official completes this form by evaluating and assigning points to information regarding education, performance reviews and test scores contained in the application. However, in the present case, as there were only two employees qualified for the vacancy, the standard numerical point rating system was not utilized by selecting officials in making their decision. Rather, it appears that the selecting officials' decision was based solely on information in the documents contained in each applicant's OPF. Therefore, the Authority finds that documents contained in Allen's OPF were necessary to enable the Union to determine if the selection process was fair and to determine whether to file a grievance.6/

The Respondent contended that pursuant to the provisions of the Privacy Act,7/ it could not lawfully provide any part of the OPF to the

4/ U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251, 253, (1982); Veterans Administration Regional Office, Denver Colorado, 7 FLRA 629 (1982).

5/ See, e.g., United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA No. 16 (1984); Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA 654 (1982).

6/ Since all of the requested documents in Allen's OPF were released at the hearing, the Authority does not reach the issue of which of the OPF documents originally withheld were necessary.

7/ Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)).

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Union unless Allen authorized release of the documents. In so contending, the Respondent asserted, and the Authority agrees, that the restrictive language in section 7114(b)(4) of the Statute, limiting an agency's duty to furnish data "to the extent not prohibited by law," incorporates the Privacy Act. The Judge, relying on earlier decisions under Executive Order 11491, as amended, did not squarely address this argument. Therefore, the Authority must decide whether disclosure of the requested data from Allen's OPF, which was previously found to be "necessary" within the meaning of section 7114(b)(4) of the Statute, is nevertheless "prohibited by law" from disclosure within the meaning of section 7114(b)(4) by the Privacy Act.

The Privacy Act regulates the disclosure of any information contained in an agency "record" within a "system of records" that is retrieved by reference to an individual's name or some other personal identifier.8/ The employee's personnel file which the Union requested in Case No. 7-CA-782 is considered a record contained within the Respondent's system of records under the Privacy Act9/ and is generally prohibited from disclosure unless one of the specific Privacy Act exceptions is applicable.10/ The exception set forth in 5 U.S.C. § 552a(b)(2) permits disclosure of Privacy Act-protected information to the extent that such information is "required" to be released under the Freedom of Information Act (FOIA).11/ The theory of the FOIA, in contrast to the Privacy Act, is that all records in the possession of the agencies of the Federal Government must be disclosed upon request unless subject to a specific FOIA exemption.12/ Under exemption (b)(6) of the FOIA, an agency is allowed to withhold personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy. In cases where requests for individually identifiable records such as promotion and personnel files are made under the FOIA, the Federal courts apply a balancing test to determine whether disclosure would result in a clearly unwarranted invasion of privacy.13/ For example, in American Federation of Government

8/ 5 U.S.C. § 522a(a)(4),(5) (1982).

9/ DOD System Notices, 48 Fed. Reg. 25502, 25507 (1983).

10/ 5 U.S.C. § 552a(b)(1)-(12) (1982).

11/ Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 256 (codified as amended at 5 U.S.C. § 552 (1982)).

12/ 5 U.S.C. § 552(a)-(b) (1982).

13/ See, e.g., American Federation of Government Employees, AFL-CIO, Local 1923 v. United States Dep't of Health and Human Services, 712 F.2d 931 (4th Cir. 1983); Celmins v. United States Dep't of Treasury, 457 F. Supp. 13 (D.D.C. 1977). See also Department of the Air Force v. Rose, 425 U.S. 433 (1976), wherein the Court stated that the (b)(6) exemption of the FOIA involves a balancing of the interests of the individuals in their privacy against the interests of the public in being informed.

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Employees, AFL-CIO, Local 1923 v. United States Dep't of Health and Human Services, 712 F.2d 931 (4th Cir. 1983), the union sought the home addresses of all unit employees pursuant to the FOIA. The Court of Appeals for the Fourth Circuit, in evaluating whether the information sought by the union should be disclosed, balanced the individual employee's interest in his or her right to privacy and the possible adverse or harmful effects on the individual which could result from disclosure against the public's interest in having the information made available. The District Court for the District of Columbia applied the same balancing test in Celmins v. United States Dep't of Treasury, 457 F. Supp. 13 (D.D.C. 1977), in determining whether the agency was required to disclose the promotion file and the other promotion documents requested under the FOIA by unsuccessful promotion applicants.

The data requested by the Union in Case No. 7-CA-782 is similar to, and in some respects the same as, the information requested under the provisions of the FOIA in the cases previously cited (supra note 13). As these cases make clear, disclosure of individually identifiable records is not prohibited by law in all circumstances. The information is often disclosed to the public under the provisions of the FOIA, in a sanitized or non-sanitized form, after the agency or the court makes a determination that such disclosure would not result in a clearly unwarranted invasion of the individual's privacy. Therefore, the Authority concludes that disclosure of documents contained in Allen's OPF pursuant to the Union's request under section 7114(b)(4) of the Statute is not per se prohibited by law but is subject to the same scrutiny and the same balancing test which is applied by the courts in evaluating FOIA requests under the 5 U.S.C. § 552(b)(6) exemption.

The balance to be drawn under the FOIA's (b)(6) exemption is one between the protection of the individual's right to privacy and the promotion of important public interests.14/ In determining whether "necessary" data under section 7114(b)(4) of the Statute should be disclosed to the Union, the Authority will balance the necessity of the data for the Union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data. In striking the balance between Allen's privacy interest and the Union's need for the documents in the circumstances of this case, the Authority notes that there has been no allegation, nor does the record reflect, that the documents in Allen's OPF sought by the Union contain any stigmatizing information.15/ Moreover, the fact that the Union requested the documents only with respect to a possible grievance proceeding concerning a particular personnel action indicates that the documents would be likely to receive only limited circulation.16/ Therefore, in view particularly of the Union's need for these documents

14/ See Department of the Air Force v. Rose, supra, 425 U.S. at 372-373.

15/ See Celmins v. United States Dep't of Treasury, supra, 457 F. Supp. at 15-16.

16/ Should the documents in fact become widely circulated, the Authority would necessarily take this experience into account in future similar cases.

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in order to pursue its representational duties and to aid in ensuring that the government's merit promotion system operates fairly, compared to the limited intrusion on Allen's privacy, the Authority finds that the disclosure of the requested documents would not result in a clearly unwarranted invasion of Allen's privacy. Further, the Authority finds in the circumstances of this case, that disclosure of the data serves two important public interests: ensures that the Government fairly follows its own merit promotion procedures, and encourages the use of non-disruptive grievance procedures.[17/] Accordingly, the Authority finds that the Privacy Act did not justify the Respondent's refusal to provide the necessary data requested by the Union under section 7114(b)(4) of the Statute and concludes that the Respondent violated section 7116(a)(1),(5) and (8) of the Statute by failing to furnish the Union with the necessary data contained in James Allen's OPF.

Additionally, the Judge found in Case No. 7-CA-795 that the Respondent did not violate the Statute by refusing to provide written data to the Union relating to the disciplinary separation of two unit employees. The General Counsel's exceptions were limited to this finding. Under the particular circumstances of the instant case, where the Union did not know the identities of, and was not asked to represent, the two employees concerning their disciplinary separations, the Authority concludes that the General Counsel has failed to meet the burden of showing that the Union's request was for data necessary for full and proper performance of its representational function within the meaning of section 7114(b)(4)(B) of the Statute.[18/] Thus, in agreement with the Judge, the Authority finds that the Respondent was under no statutory obligation to provide the requested data and, therefore, that the Respondent's failure to do so was not violative of the Statute. Accordingly, in agreement with the Judge, the Authority concludes that those allegations in the consolidated complaint pertaining to Case No. 7-CA-795 be dismissed in their entirety.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, shall:

17/ See Celmins v. United States Dep't of Treasury, supra, 457 F. Supp. at 16.

18/ In so concluding, the Authority notes that section 7121(e) of the Statute specifically provides, in part, that "[m]atters covered under section 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure . . ." (Emphasis added.)

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1. Cease and desist from:

(a) Refusing to permit the American Federation of Government Employees, AFL-CIO, Local 1345, the exclusive representative of a unit of its employees, access to the data contained in the Official Personnel File of employee James Allen which is necessary for full and proper performance by the American Federation of Government Employees, AFL-CIO, Local 1345, of its representational functions regarding the selection process for the Maintenance Worker HPP-7 position, for which Job Vacancy Number 094 was posted.

(b) Refusing to permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews as are necessary for full and proper performance by the American Federation of Government Employees, AFL-CIO, Local 1345, of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange in relation to the work performed by its employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews as are necessary for full and proper performance by the American Federation of Government Employees, AFL-CIO, Local 1345, of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange in relation to the work performed by its employees.

(b) Post at its facility at the Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the General Manager of the Exchange, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

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(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the allegation concerning the refusal to furnish desk audits for the Main Store in Case No. 7-CA-788, and the allegations in Case No. 7-CA-795 of the consolidated complaint be, and they hereby are, dismissed.

Issued, Washington, D.C., April 22, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr. Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to permit the American Federation of Government Employees, AFL-CIO, Local 1345, the exclusive representative of a unit of our employees, access to the data contained in the Official Personnel File of employee James Allen which is necessary for full and proper performance by the American Federation of Government Employees, AFL-CIO, Local 1345, of its representational functions regarding the selection process for the Maintenance Worker HPP-7 position, for which Job Vacancy Number 094 was posted.

WE WILL NOT refuse to permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews as are necessary for full and proper performance by the American Federation of Government Employees, AFL-CIO, Local 1345, of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange in relation to the work performed by its employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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WE WILL, upon request, permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews as are necessary for full and proper performance by the American Federation of Government Employees, AFL-CIO, Local 1345, of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange in relation to the work performed by its employees.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET NW.
WASHINGTON, D.C. 20036

ARMY AND AIR FORCE EXCHANGE SERVICE (AAFES), FORT CARSON, COLORADO Respondent	
and	Case Nos. 7-CA-782 7-CA-788 7-CA-795
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1345 Charging Party	

Luthur G. Jones, III, Esq.
G. T. Fearson
For the Respondent

Gavin R. Lodge, Esq.
For the General Counsel

Kenneth Bull
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Consolidated Complaint and Notice of Hearing issued on January 16, 1981 by the Acting Regional Director for the Federal Labor Relations Authority, Kansas City, Missouri Region, a hearing was held before the undersigned on March 3, 1981 at Peterson Air Force Base, Colorado.

These cases arise under the Federal Service Labor-Management Relations Statute (herein called the Act). Case No. 7-CA-782 is based

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on a charge filed on September 22, 1980 by American Federation of Government Employees, AFL-CIO, Local 1345 (herein called the Union or Charging Party) against Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado (herein called the Respondent). Case No. 7-CA-788 is based on a charge filed on September 24, 1980 by the Union against Respondent herein. Case No. 7-CA-795 is based on a charge filed on September 25, 1980 by the Union against Respondent herein.

The consolidated complaint, with respect to the aforesaid cases, alleged in substance as follows:

Case No. 7-CA-782 -- Since on or about September 11, 1980, the Union requested Respondent to furnish certain data utilized by management in filling Job Vacancy Announcement Number 094, Maintenance Worker, HPP-7, which data is necessary for the Union to perform its representational duties, and Respondent has refused to provide some.

Case No. 7-CA-788 -- Since on or about September 11, 1980, the Union requested Respondent to furnish copies of desk audits and/or the results of such audits performed on unit employees in April 1980, at the Fort Carson facility,1/ which audit was necessary for the Union to perform its representational duties, and Respondent has refused to provide some.

Case No. 7-CA-795 -- Since on or about September 11, 1980 the Union requested Respondent to furnish all data relating to the disciplinary separation of two unit employees in or about August 1980, which data was necessary for the Union to perform its representational duties, and Respondent has refused to provide such data.

The aforesaid consolidated complaint alleged that, in respect to each case, Respondent has violated Sections 7116(a)(1), (5), and (8) of the Act. Respondent's answer to the consolidated complaint, dated January 27, 1981, denied the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter briefs were filed which have been duly considered.2/

1/ The charge alleged a refusal to furnish desk audits, or the results thereof, as to employees at the main store only.

2/ During the hearing Respondent requested that, in re Case No. 7-CA-795, the undersigned examine in camera certain documents designated as AAF incident report and a Military Report involving the two employees separated by Respondent. Both documents related to theft charges against

(continued)

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Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony evidence adduced at the hearing, I make the following findings and conclusions.

Findings of Fact

1. At all times material herein the Union has been and still is, the collective bargaining representative of regular full-time and regular part-time employees[3/] who are employed by the Fort Carson Exchange at Fort Carson, Colorado and the Pueblo Army Depot, Pueblo, California.

2. A collective bargaining agreement between the Union and Respondent, covering the aforesaid employees, is effective by its terms from March 16, 1979 for a period of three years. Article 12 of the agreement provides for grievance and arbitration of disputes over the interpretation and application of the contract and other dissatisfactions.

3. (Case No. 7-CA-782) On September 11, 1980[4/] union officials Marlene Moosman and Carolyn Rains met with Dola Clark, personnel assistant of Respondent. Moosman declared that they represented David Langford, employee who complained that he had not been selected for the Job Vacancy Number 094, Maintenance Worker HPP-7. Langford objected to the selection process which resulted in the fact that James Allen was chosen for the job.

4. During this aforesaid meeting Moosman requested that management provide the union with all data, including Allen's official personnel

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2/ (continued)
said individuals. Subsequent to the hearing General Counsel filed a Motion with the undersigned to suppress any consideration of these papers and to bar Respondent from briefing any material therein. It is contended that the documents were an ex parte communication. The motion is denied. The presentation of a document during a hearing to the administrative law judge, to be examined in camera, is not tantamount to an ex parte communication under Section 2414.8 of the Rules and Regulations. Since the documents will be described with particularity herein, and the details form no part of the conclusions reached in respect to that case, the General Counsel is not prejudiced by not receiving a copy thereof.

3/ Exchange Service employees are non-appropriated fund employees.

4/ Unless otherwise stated, all dates hereinafter mentioned occur in 1980.

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file, utilized by Respondent in its selection of the candidate[5/] for the job.

5. Clark stated, in reply to the aforesaid request, that she could not give the personnel file of Allen based on the Privacy Act unless the employee signed a release for same. No such release was executed by Allen, and Respondent refused to turn over the file to the Union as requested.

6. The official personnel file[6/] pertaining to Allen is composed of various documents or papers which are as follows:

(a) Employment applications dated July 3, 1979 (past education and experience).

(b) Reference letter from vocational school together with rating of job skills.

(c) High school diploma.

(d) W4 IRS form dated August 6, 1979.

(e) Employee insurance form naming beneficiary,

(f) Certificate agreeing to standards of grooming.

(g) Affidavit declaring loyalty to the United States.

(h) Application for identification and privilege care.

(i) Supervisor's evaluation forms - September 15, 1979 - February 12, 1980, February 13, 1980 - September 26, 1980.

(j) Certificate of completion of Human Relations Training.

5/ Of those who applied for the job, only Allen and Langford qualified thereof.

6/ Although Respondent refused to furnish this file to the Union on the grounds of the Privacy Act, it did introduce Allen's personnel file into evidence at the hearing herein. Respondent took the position that it desires the Authority to rule on whether the various items in the file are non-releasable under the Privacy Act. It seeks a ruling as to whether information in personnel folders should, under the Federal Service Labor-Management Relations Statute, be furnished to the bargaining agent when the latter requests same.

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(k) Personnel request, which involve transfers, change in wage rates, classifications, et. al.

(l) Personnel action on aforesaid requests.

(m) Projected step advancement forms.

7. (Case No. 7-CA-788) In the course of various meetings between management and the Union in February and April, the bargaining agent advised Respondent that some employees in customer service thought their work deserved a higher grade. Philip Schunk, supervisor, told the union representatives thereat that an official desk audit[7/] review was forthcoming for the entire area, and that it would run from April through May of 1980. The desk audits were completed for the main store at Fort Carson as well as for two branch stores on the post.

8. A meeting was held on September 11 attended by Moosman and Rains on behalf of the Union, as well as Norman Tischer, food manager of the Fort Carson Exchange, Dan Wade, manager of the main store at Fort Carson, and Robert Paul, the Fort Carson Exchange Manager. Since there is a sharp dispute as to whether the Union did, in fact, request the desk audits for the entire exchange (including the branches), the testimonies and facts with respect thereto are set forth as follows:

(a) Moosman testified she told Paul at the meeting that the Union had not heard as to the result of the desk audits, and she "would like to know how it came out." She further testified the Union was seeking the audits for the main store and the branches. According to Moosman, the manager agreed to get back to her, and the minutes of the meeting were furnished the Union representative shortly thereafter.

(b) Rains' testimony reflects that, at the aforesaid meeting, The Union representatives stated that the audits were promised to them and they would like the information. She testified the main store was not specified, and the request was not limited to that facility.

(c) Paul testified that when he met with Moosman and

7/ A desk audit involves the acquisition of data, after interviews are conducted, re the operation of a particular job. The data is utilized by management to determine proper classifications, increases or decreases in the grade, assignment, or staffing adjustments based on the information collected.

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Rains the Union officials asked for the desk audits for the main store only.

(d) The minutes of the September 11 meeting recite[8/] that "objection was raised that union (sic) has not been informed of the results of the desk audits conducted at the Main Store by OVER-P representative." (underscoring supplied).

9. On the basis of the record I am, persuaded that on September 11 the union officials' request for the desk audits was limited to the main store. While Moosman and Rains may have intended to seek the audits for the entire facility, including the branches, I am constrained to find no such explicit request was made by them. Apart from the fact that the testimonies of both union representatives reflect that the request was not precise, there is evidence to support the conclusion that the demand for desk audits was confined to the Main Store. Thus, the minutes of the September 11 meeting stated the union was disturbed at not receiving the data for the Main Store, and no mention was made of the branches. Moreover, the Union was furnished with a copy of the minutes and registered no objection to the accuracy thereof. Further, the charge in 7-CA-788, filed by the Union herein, averred that the request was for the desk audits of the "unit employees at the Main Store." Accordingly, I find that on September 11 the Union did not request the desk audits for the entire Exchange, but asked for the audits of the employees at the Main Store only.

10. Subsequent to the request for the desk audits by the Union, Paul conferred with the personnel manager as to furnishing that data. It was concluded that management was not obligated to supply the information. Subsequently Respondent's officials changed their minds. On November 5, when Paul was given the desk audit, he provided the Union with the audits for the Main Store.

11. In January 1981, during a discussion re the unfair labor practice charge filed in this case, Moosman told Paul the Union wanted the desk audits for the branches; that it was her understanding all the audits would be furnished. Paul agreed to let Moosman know if the audits for the branches could be supplied as requested at that time. This was never done because, as the manager testified, "We had proceeded too far down the line". Thus Respondent refused to provide the Union with the desk audits for the branches of the Exchange.

12. (Case No. 7-CA-795) Under date of August 8, Paul sent letters to Ida Canty and Donna Duncan, bargaining unit employees who worked in the Respondent's warehouse at the Exchange. In said letter Paul informed

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8/ Item 5 on General Counsel's Exhibit 2.

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both employees he intended to discharge them for alleged theft on that date of AAFES property from Building 6034, Mobile Units Food Warehouse. The individuals were advised therein that they could file a reply and explain the circumstances. Thereafter, and during August, Respondent discharged Canty and Duncan.

13. By letter dated September 8, addressed to S. W. Fogleman, General Manager of AAFES, Fort Carson, Colorado, the Union president, Mike Minnick, requested all written data re the circumstances surrounding the discharge of "two unit employees at the Ft. Carson Exchange Food Warehouse in August 1980".

14. On September 11 Moosman and Rains met with Clark. While they did not know the identity of the two dischargees, the union representatives asked for the data re their termination. Whereupon Clark left the room to confer with Schunk. When she returned Clark advised them that the information could not be released due to the Privacy Act. It was not furnished by Respondent.

15. At the hearing herein Respondent submitted various documents (Identified as R 4a-4i), to be examined in camera, which concerned the apprehension of Canty and Duncan for theft of merchandise. These documents, which the employer herein refused to turn over to the Union, are identified as follows: (a) Incident Report of Exchange Detective William White, (b) Form 3975 and Report of Incident, (c) Rights warning procedure and waiver certificate executed by both employees, (d) Sworn statement signed by Canty re the incident, (e) Administrative data form re Duncan showing such, items as physical characteristics, date and place of birth, and marital status, and (f) Violation citation on both employees and a disposition form of charges on Canty.

Conclusions

Case No. 7-CA-782

It is contended by the General Counsel that the Union, as bargaining representative of the employees, was entitled to receive all data[9/] utilized by Respondent in selecting Allen for the position of Maintenance Worker, Vacancy Number 094. In seeking to obtain Allen's official personnel file, the Union insists it is pursuing representational functions; that it has the right to obtain data to determine if a grievance should be filed. Thus, since it represented unit employee Langford, the file

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9/ Since the job file contained no information forming the basis for selecting Allen, the main concern of the Union was to receive the personnel file of Allen. The data included in the latter file was utilized by management in its evaluation of that employee.

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was needed to determine whether to grieve over his non-selection. Further, the General Counsel insists the Privacy Act is no defense to Respondent's refusal to furnished Allen's personnel file under the Act herein.

Respondent adverts to the restrictive language contained in Section 7114(b)(4) of the Act. This section provides, in substance, that an agency must furnish to the exclusive representative certain data, upon request, and to the extent not prohibited by law. It is urged by the employer that this section incorporates the Privacy Act since the latter was enacted prior to the Federal Service Labor-Management Relations Act. While recognizing that the interests of the affected employee - whose file is sought by the Union herein - must be balanced against the interests of the bargaining agent, Respondent insists that giving Allen's personnel file would violate the Privacy Act. It contends that sanitizing was not applicable since the Union wanted to see the file, and that concealment of identity was not possible under the circumstances.

A lead case in the public sector established the rule that evaluation materials on a selected candidate for a job opening are clearly necessary and relevant to the processing of a grievance which disputes the selection. Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974. See also Internal Revenue Service, Chicago District Office, A/SLMR No. 1004. A Union has the right, as enunciated in the cited cases, to such information in order to perform its duties as bargaining representative. Further, this right is not limited to instances where the union is in the midst of processing the grievance itself. The representative is entitled to the data in order to determine whether to file a grievance over the non-selection of a particular employee for a position. Department of the Treasury, Internal Revenue Service and IRS Milwaukee District, A/SLMR No. 1133. In line with established precedent, I conclude that the information utilized by Respondent to evaluate Allen, in respect to the maintenance position (Vacancy No. 094), was material and relevant to the Union's performance of its functions as bargaining agent.

Apart from the issue of relevancy, in respect to the materials requested by the union in order to fulfill its representational function, employers have resisted providing the data on the ground that to do so would violate the Privacy Act. In the Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, supra, the Assistant Secretary stated that the employee's right to privacy of his records must be balanced against the conflicting rights of the exclusive representative to such information. Where, as in the cited case, evaulation materials are relevant to effective processing of an existent or potential grievance, broad rights are present in favor of disclosure. Thus, he concluded that a public interest exists in having the Federal government operate within its merit promotion system so that qualified candidates are given equitable treatment. Accordingly, the

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employer therein was ordered to make available the evaulation data re the employee selected for the position after removing therefrom any personnel information of "a sensitive or damaging personal nature". Further, the refusal to provide the materials initially was held to be a refusal to bargain and violative of Executive Order 11491, as amended. See to the same effect, Internal Revenue Service, Chicago District Office, A/SLMR No. 1004.

Applying the past decisional law to the case at bar, it is clear that the information considered by Respondent in selecting James Allen for the maintenance position - his personnel file - should have been provided the Union herein. It is obviously relevant and necessary to a determination as to whether the bargaining agent chooses to grieve on behalf of Langford. Moreover, I am satisfied, bared on the aforesaid cases, that the Union's right to such information is paramount to the individual's right to privacy of his records. It is noted that in both cases involving the Internal Revenue Service, supra, mention is made that the employer shall first remove any personal information of a sensitive or damaging nature. However, in the instant case, Allen's personnel file was introduced in evidence by Respondent and a copy furnished the other party. Thus, to order Respondent to sanitize the materials before providing them to the Union would be a futile gesture. Accordingly, I make no such directive.10/

Although the information sought by the Union, the personal file of Allen, was submitted in evidence and a reply given to the bargaining agent, this belated disclosure at the hearing does not cure the violation. Department of Health, Education and Welfare, Region VIII, A/SLMR No. 1109. As stated therein, "compliance with an exclusive representative's request for necessary and relevant information must occur in such a manner that the exclusive representative's representational rights under the Executive Order are not prejudiced." The belated submission herein foreclosed the Union's right to effectively represent Langford at the proper time, and the receipt of the data at the hearing was scarcely in conformity with Respondent's obligation.

On the basis of the foregoing, I conclude that Respondent violated

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10/ Respondent seeks a ruling, based on the introduction into evidence of Allen's personnel file, as to which individual items therein are privileged from non-disclosure under the Privacy Act. In view of my conclusions that said Act does not operate to prevent disclosure of evaulation materials, and since disclosure has been made by Respondent, I shall make no findings or recommendation in that regard. Moreover, it is not meet or appropriate that a determination be made as to future disclosures involving case situations not yet before the Authority for resolution.

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Section 7116(a)(1), (5), and (8) of the Act by failing or refusing to furnish the Union with the information contained in James Allen's personnel file.

Case No. 7-CA-788

In respect to the desk audit for the branches of the facility, Respondent does not challenge their relevance or necessity to a consideration of the comparable grades of employees in customer service. It insists that no request was made for these desk audits. However, I have found that in January 1981, the Union did ask for the audits for the entire facility. Further, that while Respondent's officials agreed to communicate with Moosman re this request, they failed to do so. Thus, the record establishes a refusal to furnish this information. Moreover, I am satisfied that the desk audits were clearly relevant and necessary for the bargaining agent to enforce the contract and fulfill its duties as the representative of unit employees. See Department of Health, Education and Welfare, SSA, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 41.

Since the charge herein alleges a refusal to provide the desk audits for the Main Store, it must be determined whether it will support the variance in the complaint wherein it is alleged that Respondent refused to furnish the audits for the entire facility.11/ Decisional law in the private sector reflects that a charge is sufficient to support allegations in the complaint where there is some relationship between the allegations in the latter and the language in the charge. Texas Industries, Inc. etc., 139 NLRB 363 aff'd. in 336 F 2d. 128 (5th Circuit, 1964). As stated in the cited case, it is the function of the complaint - not the charge - to serve notice upon a respondent of the particular conduct allegedly violative of the Act. The charge merely initiates the investigation to determine whether a complaint shall issue.

In the case at bar I am satisfied that a sufficient relationship exists between the language in the charge and his allegations of the complaint. A refusal to furnish audits for the entire facility, as alleged in the complaint, grows out of the statement in the charge that

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11/ It is not clear from the record as to the exact date in January 1981, when the Union requested the desk audits for the branches. It does appear the request was made at the monthly meeting in January. Moreover, these meetings are held in the forepart of the month and the complaint issued on January 16, 1981. It also appears that Manager Paul, at this meeting, referred to a possible withdrawal of the charge by the Union. Thus, I infer the request for the desk audits of the branches and the refusal occurred before the issuance of the complaint.

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Respondent refused to furnish the desk audits for the Main Store.12/ Further, the alleged refusal to provide the audits for the branches was litigated at the hearing, and Respondent was aware that the Union made such contention. Therefore, I conclude that the charge herein supports the complaint allegations with respect to Respondent's refusal to furnish such data. See also Decision of Administrative Law Judge Sternburg in Bureau of Land Management, Richfield District, 7-CA-247 (April 10, 1981), OALJ-81-086.

Accordingly, and in view of the foregoing I conclude Respondent ran afoul of Section 7114(b)(4) of the Act when it refused to furnish the desk audits for the branch stores in January 1981; that, by reason thereof, Respondent violated Sections 7116(a)(1), (5) and (8) of the Act.

Case No. 7-CA-795

The issue presented for determination in this case is whether the Union is entitled to obtain the data (Respondent's Exhibits 4(a) thru 4(i)) relating to the theft by employees Canty and Duncan which occasioned their discharge. General Counsel contends the Union, which sought to investigate the action taken by management, needed the records to perform its representational duties. Respondent insists that the production of such information would violate the Privacy Act, and it refused to furnish these reports and statements without a release from these employees.

As heretofore indicated in Case No. 7-CA-782, the interest of the bargaining representative and the employees, whose privacy rights are involved, have been weighed when determining whether information pertaining to such individuals should be turned over to the Union. In said cases, cited supra, the interests of the exclusive representative have been deemed paramount. The employer has been ordered to provide the agent with the data after first deleting any sensitive or damaging material therefrom.

However, a significant difference exists between those situations and the case at bar. In the non-selection cases, which concern a failure to promote a particular employee, it has been clearly established that the bargaining representative did, in fact, represent such employee. Either a grievance was filed on his behalf, or the filing thereof was under consideration. In the instant matter the record does not support the conclusion that Canty or Duncan sought representation by the Union herein. Neither does it appear that they requested a grievance be filed

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12/ In view of the fact that Respondent supplied the audits of the main store employees, I shall recommend dismissal of the complaint alleging a violation in respect thereto.

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based on their discharges. No evidence was adduced which reflects that Canty or Duncan wanted to protest the termination. In truth, when Moosman requested the information re the action taken toward these individuals, she did not know the identity of the dischargees. It is conceivable that neither Employee desired the representative to pursue the matter.

It is recognized, as hereinbefore stated, that the Union has representational functions involving the entire bargaining unit, i.e. policing the agreement and enforcing its provisions. When balancing this right against the privacy rights accorded employees who have not demonstrated their desire for representation, or not agreed to a release[13/] of the data sought by the agent, I conclude the right of the latter must fall. Unless some express indication is shown by Canty or Duncan that they wish the Union to protest the termination, or consider doing so, and have no objection to a disclosure of the records re the theft, it is difficult to fault the employer's refusal to furnish the information. Accordingly, I conclude that Respondent has not violated the Act by its refusal to provide the statements and reports, upon which it based the termination of Canty and Duncan, concerning the theft committed by these employees. Therefore, I recommend the dismissal of the complaint in so far as it alleges Respondent violated Sections 7116(a)(1), (5) and (8) by virtue of such refusal in Case No. 7-CA-795.

Having found and concluded that Respondent violated Sections 7116(a)(1), (5), and (8) of the Act in respect to Case No. 7-CA-782 and Case No. 7-CA-788, it is recommended that the Authority issue the following order:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, shall:

1. Cease and desist from:

(a) Refusing to permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the official personnel file of employee James Allen, and all other documents and materials as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational

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13/ No evidence was adduced at the hearing which shows that either Canty or Duncan agreed to release the information sought by the Union.

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functions regarding the selection process for the Maintenance Worker HPP-7, for which Job Vacancy Number 094 was posted.

(b) Refusing to permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange post, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews, as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange post in relation to the work performed by its employees.

(c) In any like or related manner, interfering with, restaining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the official personnel file by employee James Allen, and all other documents and materials as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the selection process for the Maintenance Worker HPP-7, for which Job Vacancy Number 094 was posted.

(b) Upon request, permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange post, Fort Carson, Colorado, and all other documents and materials as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange post in relation to the work performed by its employees.

(c) Post at its facility at the Army and Air Force Exchange Service (AAFES) Fort Carson, Colorado, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon

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receipt of such forms, they shall be signed by the General Manager of the Exchange and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The General Manager shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the Complaint alleging violations of Sections 7116(a)(1), (5), and (8) by Respondent in Case No. 7-CA-795, for having refused to provide written data relating to the disciplinary separation of two unit employees, be, and they hereby are, dismissed.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: June 23, 1981
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the official personnel file of employee James Allen, and all other documents and materials as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the selection process for the Maintenance Worker HPP-7, for which Job Vacancy Number 094 was posted.

WE WILL NOT refuse to permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the desk audits for the positions in the branch stores at the Exchange post, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews, as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange post in relation to the work performed by its employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request permit the American Federation of Government Employees, AFL-CIO, Local 1345, access to the official personnel file by employee James Allen, and all other documents and materials as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the selection process for the Maintenance Worker HHP-7, for which Job Vacancy Number 094 was posted.

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WE WILL, upon request permit the American Federation of Government Employees, AFL-CIO, Local 1345 access to the desk audits for the positions in the branch stores at the Exchange post, Fort Carson, Colorado, and all other data and materials pertaining to the desk audit reviews, as are necessary and relevant to the performance by American Federation of Government Employees, AFL-CIO, Local 1345 of its representational functions regarding the wage grades of the various positions in the branch stores at the Exchange post in relation to the work performed by its employees.

_____
(Agency or Activity)

Dated: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communication directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: Suite 680, City Center Square, 1100 Main Street, Kansas City, Missouri 64105, and whose telephone number is (816) 374-2199.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEALTH CARE FINANCING ADMINISTRATION

Respondent

and

Case No. 3-CA-30335

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the stipulation of facts, accompanying exhibits, and the parties' contentions,[1] the Authority finds:

The complaint alleges that the Health Care Financing Administration (the Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[2] by

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1/ The Respondent's brief was untimely filed and has not been considered by the Authority.

2/ Section 7116(a)(1) and (5) of the Statute provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the excercise by the employee of any right under this chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

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unilaterally changing a past practice concerning retroactive temporary promotions while a question concerning representation (QCR) was pending before the Authority,3/ as such change was not required consistent with the necessary functioning of the Respondent. 4/

The stipulated record reveals that since August 21, 1980, the American Federation of Government Employees, AFL-CIO (AFGE), has been certified as the exclusive representative of a consolidated unit of professional and nonprofessional employees at the Respondent's Headquarters, and that since February 17, 1982, and at all times material herein, a QCR existed involving such bargaining unit. Also, at all times material herein, AFGE Local 1923 (the Union) has been the designated agent of AFGE for handling collective bargaining issues arising within the Respondent's Baltimore, Maryland and Washington, D.C. locations.

Since about 1978, the Respondent had followed the practice of granting to an otherwise qualified employee detailed to a higher-grade position for more than 120 days a retroactive temporary promotion and backpay beginning with the 121st day of the detail. This practice was consistent with and based upon the Comptroller General's decisions in 55 Comp. Gen. 539 (1975), hereinafter referred to as Turner-Caldwell I, holding that employees detailed to higher-grade positions for more than 120 days were entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until its termination, and with 56 Comp. Gen. 427 (1977), hereinafter referred to as Turner-Caldwell II, which sustained Turner-Caldwell I. However, in or about June 1982, the Respondent decided to discontinue this practice without notifying the Union.

The stipulated record further indicates that the Respondent, a component of the Department of Health and Human Services (HHS), had earlier received a letter dated February 1982, from the Acting Director of the Division of Compensation of HHS, which referred to the Court of Claims decision in Wilson v. United States, 229 Ct. Cl. 510 (1981), wherein the court, in considering a claim for a retroactive temporary promotion and backpay based upon Turner-Caldwell II, denied such claim. Rejecting the Comptroller General's Turner-Caldwell II decision, the court held that neither the applicable statute (5 U.S.C. § 3341, which limits details to 120 days) nor the Federal Personnel Manual, authorizes a retroactive temporary promotion and backpay in cases involving overlong details. After referring to the court's decision, the letter further

3/ On December 22, 1983, the Authority issued a Decision in Case No. 3-RO-20008, thereby resolving the QCR.

4/ The gravamen of the complaint and the sole argument presented by the General Counsel is that the Respondent unilaterally instituted a change in its policy during the pendency of a QCR and that such change was not required consistent with the necessary functioning of the agency. No violation is alleged respecting the Respondent's duty to bargain over the change or its impact and implementation prior to effectuating the change, and thus the Authority does not pass upon the Union's assertions in this regard contained in its brief.

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noted the questionable validity of the Comptroller General's decision, supra, and advised the Respondent to stop processing claims for retroactive temporary promotions until the Comptroller General reached a final determination on the matter. Later, the Respondent received another letter from HHS which referred to the Comptroller General's decision in 61 Comp. Gen. 408 (1982), hereinafter referred to as Turner-Caldwell III, wherein the Comptroller General, in view of the court's decision in Wilson, overruled its decisions in Turner-Caldwell I and II, and adopted the Wilson decision. The letter also indirectly referred to the Comptroller General's decision in another case, 61 Comp. Gen. 403 (1982), hereinafter referred to as Beachley and Davis, wherein the Comptroller General carved out exceptions to the Wilson decision and, among other things, advised the Respondent to resolve any claims concerning retroactive temporary promotions consistent with the Comptroller General's decisions.5/

Sometime later, by letter dated February 9, 1983, the Respondent, in reply to a letter from the Union dated January 19, 1983, concerning retroactive temporary promotions stated, among other things, that:

> The Agency's practice has always been to follow the governing [Comptroller General] decisions in [cases concerning when employees are entitled to reimbursement for higher-grade details]. As you know, the Turner-Caldwell line of cases was reversed last year in the U.S. Court of Claims in Leon V. Wilson v. U.S. decision.

5/ In Beachley and Davis, the Comptroller General stated (1) that an agency, by its own regulation or by the terms of a collective bargaining agreement, has the discretion to establish a specified period after which it becomes mandatory to promote an employee who is detailed to a higher grade position, and (2) that if the regulation or the agreement establishes a nondiscretionary agency policy and if the provision in question is consistent with applicable Federal laws and regulations, then the violation of such a mandatory provision in a regulation or negotiated agreement which causes an employee to lose pay may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596. The Comptroller General found that the two employees involved therein were entitled to retroactive temporary promotions and backpay for details to higher-grade positions after 60 days when such promotions were mandatory by the terms of a collective bargaining agreement in one case, and by a nondiscretionary agency regulation in the other.

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> In Wilson, it was determined that payment for details to higher graded positions was deemed improper and illegal by the General Accounting Office (GAO), absent a binding Agency regulation or collective bargaining agreement (CBA). Since neither a binding Agency regulation nor CBA has ever existed in HCFA, the Agency was required to continue its practice of following the governing line of [Comptroller General] cases and modifying the procedures for reimbursement to higher graded duties to reflect the new legal interpretation.

The General Counsel and the Union argue in their briefs to the Authority that the Comptroller General's decision in Turner-Caldwell III, wherein the Comptroller General decided to follow the Wilson decision, did not require the Respondent to institute a change in its policy. Citing United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982), they contend that the Respondent's change herein was not "required consistent with the necessary functioning of the agency," and therefore the Respondent, by failing to maintain existing conditions of employment during the pendency of a QCR, violated section 7116(a)(1) and (5) of the Statute.6/

The Authority disagrees, finding that the decision in Immigration and Naturalization Service, supra, is inapposite where management's change in practice is required by applicable law. In this regard, the Respondent's practice was based upon compliance with the decisions of the Comptroller General concerning retroactive temporary promotions. It here simply followed the Comptroller General's decision as set forth in Turner-Caldwell III, consistent with the Court of Claims' decision in Wilson, i.e., that retroactive temporary promotions may not be granted in the absence of a nondiscretionary agency regulation or a collective bargaining agreement dealing specifically with the matter. It is neither alleged nor shown that such agency regulation or collective bargaining

6/ In United States Department of Justice, United States Immigration and Naturalization Service, supra, the Authority determined that the Respondent therein had committed certain unfair labor practices by failing to maintain existing conditions of employment during the pendency of a QCR because the changes were not required consistent with the necessary functioning of the agency. On review, the Fifth Circuit, in U.S. Dept. of Justice v. FLRA, 727 F.2d 481 (5th Cir. 1984), denied enforcement of two of the Authority's unfair labor practice findings, in part because the facts in that case established that a change in conditions of employment by agency management during the pendency of a QCR was the result of the exercise of a management right under section 7106 of the Statute. However, the court did not reverse the Authority's general rule that during the pendency of a QCR agency management must maintain existing conditions of employment to the maximum extent possible unless changes are required consistent with the necessary functioning of the agency. See Immigration and Naturalization Service, 16 FLRA No. 19 (1984).

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agreement existed here.7/ In these circumstances, the Respondent was not obligated to maintain, even during the pendency of a question concerning representation, a practice that had become unlawful. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982); March Air Force Base, Riverside, California, 13 FLRA 255 (1983). Accordingly, the Authority shall order that the complaint be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-30335 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 22, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

7/ Cf. U.S. Department of Justice, Immigration and Naturalization Service and National Immigration and Naturalization Service Council, American Federation of Government Employees, Local 2805, 15 FLRA No. 163 (1984) (in which the Authority stated that it had not been shown that Wilson precludes an arbitrator from appropriately awarding backpay to remedy a violation of a provision of a collective bargaining agreement); Beachley and Davis, supra, (in which the Comptroller General held that a violation of a provision in an agency regulation making temporary promotions mandatory for details to higher-grade positions after 60 days was compensable under the Back Pay Act).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Union

and

Case No. 0-AR-632

U.S. DEPARTMENT OF LABOR

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator William M. Edgett filed by the Agency under section 7122(a) of the Federal Service Labor-Managment Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter concerns an experimental program to survey the impressions of representatives of private-sector employers and employees regarding inspections by the Occupational Safety and Health Administration. A grievance was filed by several compliance officers, who conduct the inspections, which claimed that the program was in violation of the parties' collective bargaining agreement. Specifically, it was claimed that implementing the program in only two regions was discriminatory; that the program placed compliance officers in a "compromising and intimidating position"; that the requirement that the compliance officers distribute the survey forms was not in conformance with the position description; and that the program would result in compliance officers being evaluated by non-government persons. The grievance was not resolved and was submitted to arbitration. At arbitration the Agency first claimed that under section 7116(d) of the Statute,[1/] the grievance was barred by an earlier-filed unfair labor practice charge which was ultimately withdrawn. The Arbitrator ruled that the grievance was not barred by the Statute, but on the merits denied the grievance.

1/ Section 7116(d) of the Statute pertinently provides:

> [I]ssues which can be raised under a grievance procedure, may in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

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In its exception the Agency contends that the grievance was barred by the earlier-filed unfair labor practice charge and that consequently the award is contrary to section 7116(d) of the Statute.

As correctly noted by the Agency, section 7116(d) provides that when in the discretion of the aggrieved party an issue has been raised under the unfair labor practice procedures, the issue subsequently may not be raised as a grievance. In terms of this case, the Authority concludes that the Agency fails to establish in its exception that the issue raised as an unfair labor practice was the same issue raised in the grievance before the Arbitrator. As acknowledged by the Agency in its exception, the unfair labor practice charge was that the Agency had violated section 7116(a)(1), (5), and (7) of the Statute by failing to bargain over the impact and implementation of the experimental program. As already noted, it was claimed in the grievance that the program as applied violated a number of rights of compliance officer employees under the parties' collective bargaining agreement. The grievance did not address in any manner the failure of the Agency to bargain over the program. In fact, the Agency's objection to the Union's attempt to raise the question of bargaining before the Arbitrator was sustained because the Arbitrator found that it pertained to a matter "which had not been raised by the grievance." Thus, because the grievance does not concern the bargaining rights accorded an exclusive representative under the Statute, which was the issue raised under the unfair labor practice procedures, the earlier-filed unfair labor practice charge has not been shown to preclude the grievance, and therefore no basis is provided for finding the award contrary to section 7116(d) of the Statute.2/ See, e.g., United States Department of the Treasury, Internal Revenue Service, Dallas District, 13 FLRA 459, 459 n.1 (1983); Internal Revenue Service, Western Region, San Francisco, California, 11 FLRA 655 (1983).

Accordingly, the Agency's exception is denied.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this decision the Authority need not address, and expresses no opinion on, other contentions of the Agency and findings of the Arbitrator under section 7116(d) of the Statute.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, COUNCIL OF CONSOLIDATED
SSA LOCALS

Union

Case No. O-NG-866

and

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of three Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

> April 1, 1983, 9 policy changes and 90 clarifications were issued on the issue of In-Kind Support and Maintenance in the SSI Program. The Union proposes that a moratorium of 6 months duration be granted beginning April 1, 1983. During this period, errors will be noted and corrected. However, no claims representative nor data review technician will be charged with payment or documentation errors on issues relating to these 9 policy changes or 90 clarifications. If any are charged, they will be removed.

According to the Union, the instant proposal was prompted by substantial revisions to the Agency's Program Operations Manual System which guides employees in the processing of claims and post entitlement actions of claimants comprising the Agency's clientele. The Union

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asserts that it has no intention, by means of this proposal, to challenge management's right to determine the manner in which claims are to be processed or to set standards for employee performance. Rather, the Union describes the operation of the proposal as follows:

> Under the terms of this proposal, . . . management would monitor and review the work of employees, pointing out when errors are made. The error would be corrected and the employee advised why the action taken was in error and how such an error could be avoided in the future. However, for purposes of the formal evaluation of employees' performance[,] errors would not be charged for that six-month period. Thus, the adverse effects of management's introduction of this new material would be alleviated.1/

Based on the Union's explanation, which is adopted for purposes of this decision, the Authority concludes that the proposal establishes what is tantamount to a training period during which employees are to familiarize themselves with substantial revisions to their published guidance before they are charged with errors attributable to not following the new procedures. In this respect, Union Proposal 1 is to the same effect as the proposal before the Authority in American Federation of State, County and Municipal Employees, Local 2910, AFL-CIO and Library of Congress, 15 FLRA No. 112 (1984), which delayed the application of performance requirements during the first three months an employee is performing the duties of the new position. Noting that "[t]he proposal only provides that employees will not be evaluated during their training period, not that employees will not be expected to perform the work assigned," the Authority determined that the proposal did not interfere with management's right to assign work and, hence, was within the duty to bargain. Therefore, based on Library of Congress, and the reasons and cases cited therein, Union Proposal 1 is within the Agency's duty to bargain. Consequently, in view of the substantial revision of the Agency's operating procedures, Union Proposal 1, which requires imposition of a reasonable "training period," is, based on Library of Congress and the reasons and cases cited therein, within the Agency's duty to bargain.

Union Proposal 2

> We also propose the time limits for claims development be adjusted to take into consideration the additional research and development time needed in these areas (In-Kind Support and Maintenance).

1/ Union Reply Brief at 2.

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The Authority has consistently held that proposals substantively restricting management's authority to establish performance standards are inconsistent with the rights to assign work and to direct employees pursuant to section 7106(a)(2)(A) and (B) of the Statute. Here, the Union seeks to have "adjusted" the time limits established by the Agency for claims development. Such an objective is distinguishable from the result sought by Union Proposal 3 in American Federation of Government Employees, AFL-CIO, Local 2849 and Office of Personnel Management, New York Regional Office, 7 FLRA 571 (1982), which required that standards of performance "make allowances" for factors beyond employees' control. In that case, the Authority found the cited proposal constituted "a general, nonquantitative requirement" by which the application of performance standards established by management may subsequently be evaluated in a grievance by an employee who believes that he has been adversely affected by the application of such performance standards. Here, however, the proposal directly addresses the content of performance standards themselves by requiring that time limits "be adjusted." Thus, Union Proposal 2, herein, is to the same effect as Union Proposal 3 in American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA No. 127 (1984) petition for review filed sub nom. Local 32, American Federation of Goverment Employees, AFL-CIO v. FLRA, No. 85-1038 (D.C. Cir. Jan. 1, 1985), requiring that performance standards themselves be fair and equitable, which the Authority held to be nonnegotiable. Consequently, based upon Office of Personnel Management and the reasons and cases cited therein, Union Proposal 2, herein, interferes with the rights to assign work and to direct employees, reserved to management by section 7106(a)(2)(A) and (B), and likewise is outside the Agency's duty to bargain.

Union Proposal 3

> With regard to input on the SSA-450S and 1719B in the EN and UM fields, the Union proposes that claims representatives and data review technicians be given documentation errors rather than payment errors when estimates for future income are made.

It appears from the record that the Union intends, by means of this proposal, that mistakes in estimating claimants' future income be changed from one category of error to another category carrying with it a lesser degree of severity. Thus, the proposal attempts to prescribe the degree of unacceptability assignable to a specific type of error. In this respect, Union Proposal 2 is to the same effect as the union proposals, grouped under the heading "Proposals concerning definitions of errors" in American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services, Social Security Administration, 15 FLRA No. 172 (1984) petition for review filed sub nom. Department of Health and Human Services, Social Security Administration v. FLRA, No. 84-4155 (2d Cir. Oct. 25, 1984), which the Authority found to be outside

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the bargaining obligation. In so finding, the Authority noted that the proposals "prescribe what performance in terms of accuracy is to be deemed unacceptable and the degree to which it is unacceptable." Hence, based on Social Security Administration and the reasons and cases cited therein, Union Proposal 3 is inconsistent with management's rights to direct employees and to assign work, pursuant to section 7106(a)(2)(A) and (B) of the Statute, and, consequently, is outside the Agency's obligation to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 1.2/ IT IS FURTHER ORDERED that the petition for review as it relates to Union Proposals 2 and 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In finding Union Proposal 1 to be within the duty to bargain, the Authority makes no judgment as to its merits.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1923

Union

and

Case No. 0-NG-895

HEALTH CARE FINANCING ADMINISTRATION,
BALTIMORE, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of one Union proposal. Upon careful consideration of the entire record, including the parties' contentions,[1/] the Authority makes the following determinations.

Union Proposal

> If the Administration makes a cost comparison to determine the cost performance of work in-house versus performance by a contractor, the following criteria will apply to the in-house cost estimate:
>
> (1) Basic Wages used will be the actual basic wages of affected employees at the time of the cost study.

1/ The Union claims that the Agency's statement of position was not timely filed and should not be considered by the Authority. The Agency states that the Union's petition for review was received on August 30, 1983. Pursuant to section 2424.6 of the Authority's Rules and Regulations, the Agency had 30 days after the date of receipt to file its statement of position. The Agency's statement, however, was not filed with the Authority until October 4, 1983, more than 30 days after receipt. Accordingly, the Agency's statement of position was untimely filed, and the Authority has not considered it herein.

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(2) Fringe benefit factors used shall be the actual fringe benefit rates which pertain to the Administration's own true costs for affected employees at the time of the cost study.

(3) Material and other costs shall be the actual costs to the Administration for the affected activity.

(4) If any increases are computed in 1, 2, or 3 above to cover inflation, expansion of function, change of mission, etc., such increases shall be fair and reasonable.

This proposal conflicts with the Agency's right to "make determinations with respect to contracting out" pursuant to section 7106(a)(2)(B) of the Statute. In this regard, the Authority has previously determined that the right of management officials to make determinations with respect to contracting out encompasses not only the right to take such action but also the right to engage in preliminary discussion and deliberation concerning the relevant factors upon which such determinations will be made. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981) (Union Proposal 1), affirmed sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982). Thus, the Authority has found proposals which prescribe standards to be utilized by management to evaluate the factors upon which a decision to contract out could be based to be nonnegotiable because they interfere with the agency's deliberative process. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984) (Proposals 1 and 2). Therefore, based on the reasons stated in Wurtsmith Air Force Base and Homestead Air Force Base, the disputed proposal herein which specifically prescribes the standards to be used in making various calculations for the cost comparison analysis, i.e., some of the factors upon which a decision to contract out could be based, is not within the duty to bargain.

In addition, and contrary to the Union's assertions, the proposal conflicts with those portions of OMB Circular No. A-76 (hereinafter "the Circular"), which concern the development of the Performance Work Statement (PWS) which provides a comprehensive estimate of the costs of performing tasks through various courses of action and is the basis for the cost comparison between in-house and potential contract performance.

Specifically, Section 1 of the Union proposal would require that the Agency use "actual basic wages of affected employees at the time of the cost study" in determining wage costs for the in-house estimate. However,

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Part 4, Chapter 2(D)(2) of the 1983 Supplement to the Circular (hereinafter "the Supplement") requires that the in-house staffing estimate be based on "the most efficient and effective organization"2/ necessary to accomplish the task and makes it clear that such a staffing estimate might differ from the current staffing level of the Agency employees at the time of the study.3/

Further, Part 4, Chapter 2(D)(3)(d) of the Supplement requires the Agency to use a Government-wide standard step rate (i.e., step 5 for GS employees and step 4 for FWS employees) or an average step rate in calculating the in-house wage cost rather than the actual step rates of affected employees.4/ Thus, pursuant to the requirements of the Supplement, the wage figures used to develop the in-house portion of the PWS do not necessarily correspond to the actual wage costs of agency employees performing the work at the time of the study. Consequently, Section 1 of the proposal, which would require the Agency to use actual wage costs, is inconsistent with the Supplement.

2/ Part 4, Chapter 2(D)(2) of the Supplement provides, in relevant part:

> 2. In-House Staffing Estimate. Development of the in-house staffing estimate is a crucial step of the cost comparison process. The staffing estimate describes the most efficient and effective organization to accomplish requirements specified in the PWS. [Emphasis supplied.]

3/ Part 4, Chapter 2(D)(2)(b) of the Supplement provides, in relevant part:

> b. [I]t is important that the estimated workload be based on the PWS and not necessarily on the current workload, staffing or work methods. If an existing manpower standard or staffing guide is used, it may be necessary to make upward or downward adjustments. The adjustments are necessary because existing standards or guides may be based on work elements or performance standards or describe work methods which may not be appropriate to accomplish the workload described in the PWS. If current staffing patterns are used, similar upward or downward adjustments may also be needed.

4/ Part 4, Chapter 2(D)(3)(d) of the Supplement provides, in relevant part:

> d. Annual Salary/Wages - (Column D). . . . Use current pay rates based on the Government-wide representative rate of step 5 for GS and step 4 for FWS employees, or, if available and deemed accurate, an organizationally determined average step within each grade.

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Section 2 of the Union proposal conflicts with Part 4, Chapter 2(D)(3)(g) of the Supplement which mandates that when making a cost comparison between in-house and potential contract performance an agency must use various formulas, called standard factors, which calculate the cost of various fringe benefits as a percentage of wages.5/ For certain of these benefits, i.e., Medicare and FICA, the percentage formula represents the actual cost to the agency of providing the benefits. For others, most notably retirement contributions, the standard factors are only an estimate, based on Government-wide figures, of the cost of providing the benefit. Section 2 of the Union's proposal, however, would require the Agency to use actual costs in all cases to calculate fringe benefits rather than the standard factors mandated by the Supplement. Thus, Section 2 of the proposal is also inconsistent with the Supplement. See American Federation of Government Employees, AFL-CIO, Local 1622 and The Directorate Facilities and Engineering Department of the Army, Fort George G. Meade, Maryland, 17 FLRA No. 69 (1985).

Section 3 of the proposal conflicts with Part 4, Chapter 2(E)(3) of the Supplement which requires that, when calculating the cost of materials and supplies, an additional percentage is to be added to the

5/ Part 4, Chapter 2(D)(3)(g) of the Supplement provides, in relevant part:

g. Fringe Benefits or FICA - (Column G).

(1) Multiply the following Government-wide standard factors by the appropriate basic pay (column F).

(a) The Government cost factor to be used for Federal employee retirement benefits, based on a dynamic normal cost projection for the Civil Service Retirement Fund, is 20.4 percent.

(b) The Government cost factor to be used for Federal employee insurance (life and health) benefits, based on actual cost, is 3.7 percent, plus an additional 1.3 percent for Medicare up to annual salary limitations placed on employees covered under FICA.

(c) The Government cost factor to be used for Federal employees workmen's compensation, bonuses and awards and unemployment programs is 1.9 percent.

(2) The Federal Insurance Contributions Act (FICA) cost factor will be applied to applicable employees (normally intermittent employees). Be careful to apply the FICA rate only to wages and salaries subject to the tax; there is an annual salary limitation for FICA tax and new Federal employees will be affected by FICA taxes.

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purchase price of materials acquired from other government agencies.6/ This additional percentage is intended to account for the amount spent for acquisition and storage by the General Services Administration which is not included in the cost of the items. Therefore, as Section 3 of the proposal would require that the cost figures used for these materials be based solely on "actual costs" it is inconsistent with the mandate of the Supplement.

Since Section 4 of the Union proposal is integrally related to Sections 1, 2 and 3 and cannot be considered separately from them, it is for all the reasons cited above, also inconsistent with the Supplement.

6/ Part 4, Chapter 2(E)(3) of the Supplement provides, in relevant part:

> 3. Pricing Material From Other Government Agencies. Costs associated with materials obtained from other agencies will also be added as a material mark-up to the material and supply cost.
>
> a. General Services Administration. In most instances, the prices charged by GSA for material do not include all the costs of the acquisition and storage functions performed by GSA. Since inclusion of these costs in GSA prices is not authorized by law, it will be necessary to adjust GSA prices for purposes of the cost estimates. Following is a description of the material and supply services provided by GSA together with mark-up rates to be applied to GSA prices:
>
> (1) Wholesale and Stores Direct Delivery. The wholesale program involves the distribution of common-use, commercially available items through a network of supply distribution facilities located throughout the United States. Also included is the Stores Direct Delivery Program. This program provides the same type of items carried in stock which, because of volume orders, are procured from the vendor for direct delivery to the requisitioner in instances when delivery time is not critical. Add 21 percent.
>
> (2) Retail. The Retail Program provides high demand common-use office and janitorial requirements from retail outlets located in areas of concentrated Federal activity. Add 36 percent.
>
> (3) Nonstores Direct Delivery and Competitive Federal Supply Schedules. This program is concerned with obtaining customer nonstock requirements through direct shipment from the vendor. Presently, agencies are ordering directly from vendors using schedules established by the GSA Federal Supply Service. Agencies pay the vendors directly for goods and services obtained. Add 5 percent. [Emphasis in original.]

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Since the proposal is inconsistent with the Circular and its Supplement, it would be outside the duty to bargain if the Circular constitutes a "Government-wide rule or regulation" within the meaning of section 7117(a)(1) of the Statute. The Authority has previously determined that the Circular and its Supplement are Government-wide regulations within the meaning of the Statute. American Federation of Government Employees, AFL-CIO, Local 1622 and The Directorate Facilities and Engineering Department of the Army, Fort George G. Meade, Maryland, 17 FLRA No. 69 (1985); American Federation of Government Employees, Local 225, AFL-CIO and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey, 17 FLRA No. 66 (1985) (Union Proposal 3). Consequently, the proposal is outside the duty to bargain under section 7117(a)(1) of the Statute.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

Respondent

and

Case No. 3-CA-30282

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2782, AFL-CIO

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts, accompanying exhibits, and the parties' contentions, the Authority finds:

The complaint essentially alleges that the U.S. Department of Commerce, Bureau of the Census (the Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to reopen contract negotiations after the membership of the Charging Party, American Federation of Government Employees, Local 2782, AFL-CIO (the Union), refused to ratify the tentative agreement reached by the parties.1/

1/ Section 7116(a)(1) and (5) of the Statute provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(Continued)

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The Union is the exclusive representative of two bargaining units of employees of the Respondent who are located in the Washington, D.C. metropolitan area. The parties' collective bargaining agreement, which was ratified by the Union's membership and effectuated on June 23, 1977, was in effect at all times material herein. Article 6 of that agreement pertaining to the parties' negotiated ground rules, provides in pertinent part as follows:

ARTICLE 6 -- FUTURE NEGOTIATIONS

. . . . . .

6.2 Proposals. The initiating party shall submit its proposals, in writing, at least 40 days prior to the scheduled commencement of negotiations. Following receipt of such proposals, the other party shall have no more than 20 days in which to submit, also in writing, any counterproposals or new matter. No new matter will be admitted for negotiation from either party following the first 12 hours of negotiations; either party may at any time submit counterproposals to or modifications of proposals previously admitted. . . .

6.3 Signifying Agreement. When agreement is reached upon any proposal, or any part of a proposal, the two chief negotiators shall signify such agreement, either through their initials or through some other device, on the face of the proposal. Such signification shall not, however, preclude the parties from mutually agreeing to reconsider or revise previously approved proposals at any time prior to the formal termination of negotiations. . . .

(Continued)

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

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. . . . . .

6.7 Effective Date. Any substantive agreement reached shall become effective between the parties on the date of signing, following ratification by the membership and approval by the National President of the Union, and approval by the Director.

On or about June 11, 1980, the Respondent and the Union commenced negotiations for a new collective bargaining agreement which after numerous sessions was completed on September 1, 1982.[2/] Thereafter, the Respondent and the Union initialed off on a final package of proposals to constitute their tentative collective bargaining agreement. The Respondent was informed by the Union at that time that the tentative agreement would be placed before its membership for a ratification vote. On or about September 23, the Union's membership, after having reviewed the subject agreement, voted against ratification. On or about September 24, the Union notified the Respondent of the outcome of the ratification vote and requested the resumption of negotiations.

On or about October 21, the Respondent wrote to the Union noting, inter alia, that in light of the vote not to ratify the tentative agreement, it was incumbent on the Union to submit proposals in advance of further negotiations; the Respondent also in such letter, and again on or about November 4, requested the Union to clarify the bargaining authority of its negotiators. The Union submitted 26 proposals on December 29, certain of which concerned matters not previously proposed during the period between June 1980 and December 29, 1982, and whose omission from the tentative contract had been noted by the Union's membership as a reason for its rejection.

By letter dated January 19, 1983, the Respondent, noting the Union's proposals, informed the latter that it would, pursuant to Article 6.3 of the ground rules, reconsider only those six provisions which the parties had previously negotiated and embodied in their tentative agreement. Thereafter, on February 1, 1983, the Union filed the unfair labor practice charge herein.

For the reasons discussed below, the Authority concludes that the Respondent's admitted refusal to reopen negotiations, pursuant to the Union's request, except for the six items listed in its memorandum of January 19, 1983, constitutes a violation of section 7116(a)(1) and (5) of the Statute.

2/ Hereinafter, all dates refer to the year 1982 unless otherwise indicated.

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Section 7114(a)(4) and (b)(2) of the Statute provides, in relevant part, as follows:

> § 7114. Representation rights and duties
>
> . . . . . .
>
> (a)(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. . . .
>
> . . . . . .
>
> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation --
>
> . . . . . .
>
> (2) to . . . discuss and negotiate on any condition of employment[.]

It is apparent from the specific language of the aforementioned provisions of the Statute that an agency and the exclusive representative of its unit employees have an obligation to negotiate in good faith with respect to any condition of employment affecting unit employees in an effort to arrive at a collective bargaining agreement. The exclusive representative may, however, waive its statutory right to negotiate on such matters by clear and unmistakable conduct. Library of Congress, 9 FLRA 427 (1982); Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548 (1981); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). Further, with respect to the bargaining process, the Authority has found that ratification of a tentative agreement by a union's membership may be a precondition to a binding agreement. Department of Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA 571 (1984).

The Respondent argues that by virtue of Article 6.3 of the parties' ground rules, which precludes the reconsideration or revision of proposals previously approved by the parties absent mutual agreement, the Union waived its right to reopen contract negotiations in the wake of the ratification vote. The Authority disagrees. In so concluding, the Authority finds that the Union did not clearly and unmistakably waive its right to reopen contract negotiations. In this regard, Article 6.7 of the parties' ground rules on its face specifically provides for

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"ratification by the membership" prior to any substantive agreement becoming effective. Also, the stipulated record reveals that the parties' existing collective bargaining agreement had been ratified by the Union's membership prior to its effectuation, and that on the date the parties initialed off on their final package of proposals herein, the Union informed the Respondent that such proposals would be placed before its membership for a ratification vote. Therefore, under these circumstances, the Authority finds that ratification by the Union's membership was a precondition to a binding agreement, and that neither the language of Article 6 of the parties' ground rules nor the record evidence establishes that the Union clearly and unmistakably waived its right to reopen contract negotiations following a failure to ratify the tentative agreement.

At the same time, the Respondent's obligation to bargain is not without limits under the facts presented. Irrespective of ratification procedures, Article 6.2 clearly limits the rights of the parties to raise new matters after the first twelve hours of negotiations. Pursuant to that contractual provision, the Respondent is not obligated to negotiate on proposals which are entirely new or which are not "counterproposals to or modifications of proposals previously admitted . . . ." Examples of new matters raised by the Union in its proposals submitted after the ratification vote include a Mini-Arbitration procedure and the contemplated establishment of a Day Care Center rather than a Task Force to study the feasibility of such a center.

Since the record reveals that the Respondent refused to negotiate over certain Union proposals dated December 29, 1982, which were not entirely new matter, the Authority finds that the Respondent violated section 7116(a)(1) and (5) of the Statute when it refused to reopen contract negotiations on such proposals after the Union's membership refused to ratify the tentative agreement reached by the parties. See Norfolk Naval Shipyard, 9 FLRA 36 (1982), aff'd sub nom. Tidewater Virginia Federal Employees Metal Trades Council v. FLRA, No. 82-1876 (D.C. Cir. May 4, 1983).

Accordingly, in view of the foregoing, the Authority concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to reopen contract negotiations after the Union's membership refused to ratify the tentative agreement reached by the parties.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Commerce, Bureau of the Census shall:

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1. Cease and desist from:

(a) Failing and refusing to negotiate in good faith with the American Federation of Government Employees, Local 2782, AFL-CIO, the exclusive representative of its employees, with respect to conditions of employment relating to negotiations for a new collective bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, Local 2782, AFL-CIO, the exclusive representative of its employees, bargain with respect to conditions of employment relating to matters previously raised during negotiations for a new collective bargaining agreement, subject to any contractual agreement which may have been reached and approved by the parties subsequent to December 29, 1982.

(b) Post at all of its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Bureau of the Census, or his or her designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to negotiate in good faith with the American Federation of Government Employees, Local 2782, AFL-CIO, the exclusive bargaining representative of our employees, with respect to conditions of employment relating to negotiations for a new collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL negotiate in good faith with the American Federation of Government Employees, Local 2782, AFL-CIO, the exclusive bargaining representative of our employees, upon request, with respect to conditions of employment relating to matters previously raised during negotiations for a new collective bargaining agreement, subject to any contractual agreement which may have been reached and approved by the parties subsequent to December 29, 1982.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO

Union

and

Case No. O-NG-776

DEPARTMENT OF LABOR

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of six Union proposals.1/ Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

1a. Vacancies under the reorganization will be limited to DIT [Directorate of Information Technology] employees and be filled from the top down to maximize the number of promotions in DIT.

1d. In addition to the co-op program, Management will provide four upward mobility positions for employees in DIT.

In its Reply Brief, the Union asserts that Union Proposal 1a was "inartfully drafted" and that it is merely intended to limit advertising of unit vacancies to the bargaining unit. Therefore, in the Union's view, the proposal is negotiable because it does not require that vacancies be filled by unit employees. However, the Authority has consistently held that it will not base a negotiability determination on a union's statement of intent which is inconsistent with the express language of the disputed proposal. See, e.g., American Federation of

1/ In its Reply Brief, the Union withdrew several additional proposals and portions of others.

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Government Employees, AFL-CIO, Local 2955 and National Guard Bureau, Office of the Adjutant General, Des Moines, Iowa, 5 FLRA 617 (1981). In this connection, the proposal makes no reference to vacancy announcements. Moreover, in its negotiability determination and in its Statement of Position, the Agency based its position on its understanding that the proposal required the filling of bargaining unit vacancies with bargaining unit employees. That interpretation was not "corrected" by the Union. The Agency's interpretation is therefore deemed consistent with the language of the proposal and is adopted for the purpose of this decision. Hence, Union Proposal 1a is to the same effect as those proposals the Authority has found nonnegotiable which sought to limit the selections for bargaining unit vacancies to bargaining unit employees. The Authority has consistently held with respect to such proposals that they are inconsistent with management's right, pursuant to section 7106(a)(2)(C) of the Statute, to select from among properly ranked and certified candidates or from any other appropriate source. See, e.g., National Federation of Federal Employees Local 1332 and Headquarters, U.S. Army Materiel Development and Readiness Command, Alexandria, Virginia, 6 FLRA 361 (1981) (Union Proposals III and IV). Consequently, Union Proposal 1a is also outside the duty to bargain.

Union Proposal 1d, in requiring that a specific number of positions be set aside as "upward mobility positions," is to the same effect as the proposal which was before the Authority in National Treasury Employees Union and Internal Revenue Service, 2 FLRA 281 (1979). The Authority held that the portion of the disputed proposal requiring that a specified percentage of agency vacancies be filled as upward mobility positions was inconsistent with management's rights, pursuant to section 7106(a)(2)(C) of the Statute, to select candidates and to fill positions. Hence, based on Internal Revenue Service, and the reasons stated therein, Union Proposal 1d is outside the duty to bargain.

Union Proposal 2

> Performance Appraisal. The reorganization will not be implemented until all employees have developed their performance standards based on their P.D. [position description] and signed them as accepted.2/

The Union, in its Reply Brief, asserts that Proposal 2 is not intended "to alter the contractual process for establishing [performance] standards" prevailing prior to the bargaining unit's reorganization and relocation which occasioned the instant negotiations. However, based on

2/ As originally submitted to the Authority, Union Proposal 2 referred to "performance appraisal based on their PD." However, the Agency, in its Statement of Position, construed this phrase as referring to "performance standards," and this construction was subsequently affirmed by the Union.

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the record, it appears that the parties' subsisting negotiated agreement provides for consultation between supervisor and employee concerning revised performance standards and permits an employee 10 working days to examine and consider the revised standards. The existing agreement does not require employee development of the standards nor employee acceptance of them as a condition to their implementation, as does the language of disputed Proposal 2.[3/] On its face then, and contrary to the Union's statement of intent, Union Proposal 2 is to the same effect as Union Proposal 1 in National Association of Government Employees, Local R14-89 and Headquarters, U.S. Army Air Defense Center and Fort Bliss, Texas, 9 FLRA 1033 (1982). The Authority found that proposal, which would have conditioned the abolishing of positions and redistributing of duties to other employees upon the approval by the personnel receiving the new work of revised critical elements and performance standards, to be inconsistent with management's rights, pursuant to section 7106(a)(2)(A) and (B) of the Statute, to direct employees and to assign work. Consequently, based on U.S. Army Air Defense Center and Fort Bliss, and the reasons and cases cited therein, Union Proposal 2, herein, is outside the duty to bargain.

Union Proposal 3

> QUALITY CIRCLES. Management and the Union will establish a joint study committee to explore the feasibility of Quality Circles in the DIT program, to facilitate the introduction of "modern systems."

The Union asserts that its Proposal 3 responds to management's announced plan to introduce new technology, or "modern systems" into the bargaining unit. Further, the Union states:

> The proposal is intended to have the parties establish a committee to explore the feasibility of quality circles in [the bargaining unit]. The proposal does not require that the agency negotiate at all, only that the agency discuss the possibility of quality circles with the union through an ad hoc committee structure.[4/] [Footnote added.]

Thus, the Union characterizes this proposal as a procedure, within the meaning of section 7106(b)(2), to be followed by management in exercising its reserved authority under the Statute.

3/ As noted previously, the Authority will not base a negotiability determination on an explanation clearly at odds with the express language of a proposal. Office of the Adjutant General, Des Moines, Iowa, 5 FLRA 617 (1981).

4/ Union Reply Brief at 5.

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In agreement with the Union, and contrary to the Agency's position, the Authority finds that the proposal would not directly concern the technology, methods, and means of performing work, matters which may only be negotiated at management's election pursuant to section 7106(b)(1) of the Statute. That is, it does not appear on its face, nor does the Union's explanation compel the conclusion that the proposal would in any way impede the introduction by management of "modern systems." Rather, this proposal would only obligate the Agency to discuss with the Union the possibility of using quality circles to serve as a forum for evaluating employee concerns, suggestions, etc., concerning the introduction of "modern systems." In this regard, the disputed proposal is to the same effect as the Union Proposal before the Authority in American Federation of Government Employees, AFL-CIO, Local 2761 and U.S. Department of the Army, U.S. Army Adjutant General Publication Center, St. Louis, Missouri, 14 FLRA 438 (1984) which sought establishment of a joint labor-management committee to serve as a forum for evaluating employee training needs and for formulating programs to meet those needs, without obligating the agency to bargain on the specific content of training. The Authority concluded that the proposal was not inconsistent with any substantive agency rights, but, rather, constituted a negotiable procedure to be followed by management in exercising its substantive rights, within the meaning of section 7106(b)(2) of the Statute. Thus, based on U.S. Army Adjutant General Publication Center, and the reasons and cases cited therein, Union Proposal 3, herein, which also constitutes a procedure to be followed by management in exercising its rights, is within the Agency's obligation to bargain.5/

Union Proposal 4

> COMPETITIVE LEVELS. Competitive levels will be structured to more clearly support the regulations, including [5 CFR] 351.403 "all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules and working conditions so that an agency readily may assign the incumbent of any one position to any of the other positions without . . . unduly interrupting the work program."

5/ In finding Union Proposal 3 within the duty to bargain, the Authority makes no judgment as to its merits. Moreover, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain on this proposal, in the circumstances of this case, these issues may be raised in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

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> Management analyst and Computer Assistant [positions] will remain in the same competitive level they were in under the old organization.

The Agency objects to the first paragraph of Union Proposal 4 on the basis that "the subject matter is already covered under governing regulations[.]" Furthermore, the Agency contends, "If [the Union] disagrees with the administration of the regulations by [the Agency] it can grieve, but it cannot renegotiate these regulations."6/ It does not appear that the Agency's use of the term "renegotiate" is intended to imply that the first paragraph of the proposal is inconsistent with the regulations themselves. Rather, it appears that the Agency opposes incorporation of the regulatory requirements in the agreement. Indeed, comparison of this portion of the proposal, especially the part enclosed by quotation marks, with the cited Office of Personnel Management (OPM) regulations, as printed in the latest edition of the CFR (1984 Supp.), reveals that, while the part of the proposal in quotes is not quite an exact reiteration of the regulations, the minor variations in the proposal do not render it inconsistent with the regulations.7/ In these circumstances, the Agency has raised no viable objection to the first paragraph. Additionally, it is noted that the subject matter of the first paragraph is not expressly excluded by section 7121 of the Statute from coverage of a negotiated grievance procedure and is therefore a matter appropriate for collective bargaining. See, e.g., National Treasury Employees Union and Internal Revenue Service, 3 FLRA 693 (1980) (Union Proposals II and III); and Association of Civilian Technicians, New York State Council and State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Union Proposal 1).8/

The second paragraph of Union Proposal 4 would, in effect, require employees in the listed occupations to remain in the same competitive

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6/ Agency Statement of Position at 6.

7/ The pertinent part of 5 CFR § 351.403 provides:

> (a) Each agency shall establish competitive levels consisting of all positions in a competitive area in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program.

8/ In finding the first paragraph of Union Proposal 4 within the duty to bargain, the Authority makes no judgment as to its merits.

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level for the life of the parties' agreement. The proposed requirement reflects the Union's belief that "the two types of positions belong in the same competitive level."9/ In this regard, the Authority notes that a position's competitive level is determined by, inter alia, duties, responsibilities and working conditions and that to be in the same competitive level, positions must be "sufficiently alike" so that "an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program." See n.7. Thus, the proposal's second paragraph, read in conjunction with the OPM regulations defining "competitive levels" imposes a limitation on the Agency's authority, pursuant to section 7106(a)(2)(B) of the Statute, to assign work. That is, the Agency would either be constrained to maintain duties, responsibilities and working conditions for these occupations as they existed under the old organization or to effect only such changes in these factors as would allow assignment, in conformity with the regulations, of the two occupations to the same competitive level. In limiting management's discretion in making work assignments to employees in the listed occupations, the second paragraph of Union Proposal 4 is to the same effect as the proposal before the Authority in International Association of Fire Fighters, Local F-109, AFL-CIO and Department of the Army, Headquarters, Carlisle Barracks, Pennsylvania, 8 FLRA 35 (1982) which required, inter alia, that work assignments be consistent with the position classification standards of the particular occupation. Consequently, based on Carlisle Barracks, and the reasons and cases cited therein, the second paragraph of Union Proposal 4 is likewise inconsistent with management's right, pursuant to section 7106(a)(2)(B), to assign work and is, therefore, outside the duty to bargain.

Union Proposal 5

> TRAINING. The Union and Management will establish a joint training committee to facilitate training for the implementation of the transition to "modern systems."

The Agency contends that it is not obligated to bargain on Union Proposal 5 because, based upon provisions in the parties' current negotiated agreement, "the Union has made a clear and unequivocal waiver to negotiate further on the subject of training during mid-term as proposed."10/ The Agency also asserts that the proposal concerns the technology, methods and means of performing work and, therefore, pursuant to section 7106(b)(1), is negotiable only at the Agency's election.

9/ Union Reply Brief at 7.

10/ Agency Statement of Position at 7.

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As to the Agency's first contention, in accordance with the Authority's decision in American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984), the Agency's position concerning waiver does not provide a basis for dismissing the petition as it relates to Union Proposal 5.

Contrary to the Agency's second contention, the Authority finds that the proposal does not directly concern the technology, methods and means of performing work. In this regard, there is nothing in either the parties' agreement, or the language of the proposal itself, which would require the conclusion that the committee proposed to be established would function in anything other than a consultative capacity to suggest methods for meeting training needs. Indeed, the provisions of the parties' present agreement, included in the record and cited by both parties with respect to the waiver issue, lends further support to this conclusion. Consequently, for the reasons set forth concerning Union Proposal 3, above, and again based upon U.S. Army Adjutant General Publication Center, 14 FLRA 438 (1984), Union Proposal 5, which only concerns a procedure by which the Agency will exercise its management rights, is within the duty to bargain.11/

Union Proposal 6

d. Private offices will be on the inside core near the main entrance. Employee work areas will be on the outside of the room where there is better light and less internal office traffic.

f. A second entrance at N1321 will be established so employees may enter and leave without creating traffic through the whole work area and have access to the nearest drinking fountain and provide a second employee escape from the hallway.

g. Window areas will not be blocked by private offices and high partitions.

h. Doors will not be alarmed. As in GAO 2832, they will be set so they cannot be opened from the hallway.

The Agency asserts that it is under no obligation to bargain over Union Proposal 6 sections d and g because the offices which are the

11/ In finding Union Proposal 5 to be within the duty to bargain, the Authority makes no judgment as to its merits. Again, as noted in n.5, supra, any subsisting factual issues concerning the obligation to bargain should be resolved in other appropriate proceedings. Wurtsmith Air Force Base, 14 FLRA 302 (1984).

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subject of these portions of the proposal are occupied by nonbargaining unit personnel. In response, the Union contends, with regard to section 6d that the second sentence of the paragraph "refers only to the space to be used by bargaining unit employees."12/ The Union does acknowledge, however, that at least some of the private offices referred to in Proposal 6 are occupied by nonbargaining unit employees. Thus, section 6d, by fixing the location within the building of space to be occupied by unit employees, inevitably has an impact on the location of nonunit personnel. That is, locating unit space on the outside of the the room would require that private offices, occupied by employees outside the bargaining unit, be sited elsewhere. It is well established that the duty to bargain does not extend to matters concerning positions and employees outside the bargaining unit. See, e.g., International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 8 FLRA 212 (1982). Insofar as section 6g, which also affects the location of private offices by prohibiting them from being located next to windows, would also directly determine conditions of employment of nonunit employees, it concerns matters beyond the representation rights of the Union and likewise is not within the Agency's obligation to bargain.

The Agency alleges that sections f and h of Union Proposal 6 are nonnegotiable because they interfere with its reserved right, pursuant to section 7106(a)(1) of the Statute, to determine its internal security practices. Alarming of doors and limiting access to the work area clearly are measures directly related to the internal security of the Agency. In this regard, the Authority observed, in National Association of Government Employees, SEIU, AFL-CIO and Department of the Air Force, Scott Air Force Base, Illinois, 16 FLRA No. 57 (1984), that ". . . an agency's right to determine its internal security practices includes the right to determine policies and actions which are part of its plan to secure or safeguard its physical property against internal or external risks." Since sections f and h on their face concern what methods management must, or must not utilize with regard to limiting access into or out of its work area, they are inconsistent with the authority, pursuant to section 7106(a)(1), to determine internal security practices and are outside the duty to bargain.13/

12/ Union Reply Brief at 8.

13/ Cf. American Federation of Government Employees, AFL-CIO, Local 1760 and Department of Health, Education and Welfare, Social Security Administration, Northeastern Program Service Center, Flushing, New York, 8 FLRA 202 (1982) (proposal found negotiable where, on its face, it did not relate to internal security matters and the agency failed to demonstrate such relationship).

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Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to Union Proposals 1, 2, the second paragraph of Union Proposal 4 and Union Proposal 6 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 3, the first paragraph of Union Proposal 4 and Union Proposal 5.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 32, AFL-CIO

Union

and

Case No. O-NG-966

OFFICE OF PERSONNEL MANAGEMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents an issue relating to the negotiability of the following Union proposal:

> Employees will not be asked to perform those duties in cases where the skills necessary or required are beyond the skills they possess.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination.

The Union proposal would expressly prevent the Agency from assigning work to an employee unless that employee currently possessed the skills necessary or required to perform the work. This would be true even if the assignment was for the purpose of training or to enhance the employee's current skills or abilities. In this regard, the proposal is to the same effect as Union Provision 2 in National Federation of Federal Employees, Local 1622 and Department of the Army, Headquarters, Vint Hill Farms Station, Warrenton, Virginia, 16 FLRA No. 82 (1984), which provided, inter alia, that supervisors would, insofar as possible, attempt to avoid assigning duties to employees which were "inappropriate to their positions or qualifications." The Authority found that provision 2 in Vint Hill Farms Station interfered with management's right to assign work pursuant to section 7106(a)(2)(B) of the Statute because it expressly prevented the

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Agency from assigning duties to employees in the circumstances described in the provision. Thus, based on Vint Hill Farms Station and the case cited therein, the instant proposal, which also expressly precludes the assignment of work in certain circumstances, directly interferes with management's right to assign work and is nonnegotiable.*/ See National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Union Proposal V).

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this disposition, it is unnecessary to address the Agency's additional contentions as to the nonnegotiability of the proposal.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. OFFICE OF PERSONNEL MANAGEMENT

Respondent

and

Case No. 3-CA-20383

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 32, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and a supporting brief and the General Counsel filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order. Thus, the Authority agrees that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to furnish to the exclusive representative of its employees data reasonably available and necessary for the Union to perform its representational function within the meaning of section 7114(b)(4) of the Statute. In adopting this conclusion, the Authority rejects, for the reasons fully set forth in Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA No. 92 (1985), the Respondent's contention that the release of the data sought was prohibited by the Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. §552a (1976)).

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Office of Personnel Management, Washington, D.C., shall:

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1. Cease and desist from:

(a) Refusing to provide to the American Federation of Government Employees, Local 32, AFL-CIO, the employees' exclusive representative, all requested data reasonably available and necessary for it to properly perform its representational function in connection with the grievance filed by employee Sally Cottam on January 6, 1982.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, provide to the American Federation of Government Employees, Local 32, AFL-CIO, the employees' exclusive representative, all requested data reasonably available and necessary for it to properly perform its representational function in connection with the grievance filed by employee Sally Cottam on January 6, 1982.

(b) Post at its facilities in Washington, D.C. copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 23, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to provide the American Federation of Government Employees, Local 32, AFL-CIO, the employees' exclusive representative, all requested data reasonably available and necessary for it to properly perform its representational function in connection with the grievance filed by employee Sally Cottam on January 6, 1982.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, provide to the American Federation of Government Employees, Local 32, AFL-CIO, the employees' exclusive representative, all requested data reasonably available and necessary for it to properly perform its representational function in connection with the grievance filed by employee Sally Cottam on January 6, 1982.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region III, whose address is: P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8452.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. OFFICE OF PERSONNEL MANAGEMENT Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 32, AFL-CIO Charging Party	Case No.: 3-CA-20383

D. Randall Frye, Esq.
For the General Counsel

Eugene N. Scallan and
Stuart M. Foss, Esqs.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq. (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. Chapter XIV, § 2410 et seq.

On July 19, 1982, the Regional Director for Region 3 of the Federal Labor Relations Authority (hereinafter called the Authority) pursuant to charges originally filed by the American Federation of Government Employees, Local 32, AFL-CIO (hereinafter called the Union) issued a Complaint and Notice of Hearing alleging that the U.S. Office of Personnel Management (hereinafter called Respondent) engaged in unfair labor practices within the meaning of section 7116(a)(1), (5) and (8) of the Statute by denying a request for necessary and relevant information to prepare an employee grievance thereby failing to comply with section 7114(b)(4)(A), (B) and (C) of the Statute and refusing to negotiate in good faith with the Union.

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Respondent filed an Answer denying commission of any unfair labor practices.

A hearing in this matter was conducted before the undersigned at Washington, D.C. All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Also all parties filed timely briefs.

Based upon the entire record in this matter, including my observation of the witnesses and their demeanor, and upon my evaluation of the evidence, I make the following findings, conclusions, and recommendations.

Findings of Fact

The facts are brief and uncontested.

Respondent and the Union are parties to a collective bargaining agreement which became effective in May 1960, and which remained in full force and effect at all times material herein. The aforementioned agreement contains a full scope grievance procedure with binding arbitration.

Sometime in 1981, pursuant to the parties collective bargaining agreement, Steven Weisberg, a Union steward, filed a grievance on behalf of unit employee, Sally Cottam. The grievance alleged, among other things, contractual and regulatory violations regarding a performance appraisal of Ms. Cottam by her supervisor, Patsy Reid. Respondent resolved this grievance at the fourth step of the grievance procedure by directing Ms. Reid to prepare two new appraisals. The new appraisals were to reflect the performance of Ms. Cottam for the periods from: May 15, 1980 to December 13, 1980 and December 14, 1980 to October 14, 1981. These appraisals were prepared by Ms. Reid during the latter part of December 1981.

After reviewing the December 1981 appraisals with Ms. Cottam, Weisberg filed a second grievance regarding the appraisal for the period December 14, 1980 to October 14, 1981, as it showed that Ms. Cottam's performance had deteriorated. This grievance also alleged contractual and regulatory violations regarding the appraisal. At the conclusion of the third step, the Union decided that it needed additional information to further pursue the grievance. Accordingly, the Union, by letter dated February 19, 1982, requested Respondent to provide it with copies of appraisals for staffing clerks in the same work unit as Ms. Cottam. This request involved approximately 10-12 such employees.

By letter dated February 24, 1982, Respondent denied the Union's request stating, inter alia, "we have determined that the information you have requested is neither relevant nor necessary as outlined in 5 U.S.C. 7114(b)(4). Consequently, we feel that we have no obligation to provide you with the information you have requested". Respondent provided no other reason for the denial at that time.

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In making its request for the above-mentioned information, the Union clearly indicated that such information was necessary for its preparation of the fourth step grievance of Ms. Cottam. Further, Union steward Weisberg's testimony revealed that the Union needed the information for the following reasons: (1) Ms. Cottam had been promoted at the end of her last appraisal period and the Union "considered it to be highly unusual for an employee's performance to deteriorate markedly after a promotion"; (2) to ensure that Ms. Cottam was not treated differently than other employees since she had been active in the Union and a Union steward; (3) to determine if there was a pattern of employees' performance deteriorating after a promotion; and (5) generally to determine if arbitration of the grievance was warranted.

After receipt of Respondent's February 24, 1982, denial of the Union's information request, Weisberg met with Union President Karen Boyd. Together they concluded that an "unfair labor practice charge was in order". Thereafter, Weisberg requested an extension of time to file the fourth step grievance. Respondent granted a one week extension and Weisberg prepared the fourth step grievance without the requested information. Ultimately, Respondent denied the fourth step grievance. Without the information, the Union concluded that it could not pursue the grievance further.

Discussion and Conclusions

The principal issue here is whether or not an exclusive bargaining representative is entitled to be furnished information which is relevant and necessary to processing a grievance from an employing agency. That issue has been resolved by the Authority in several recent cases See, Veterans Administration Regional Office, Denver, Colorado, 7 FLRA (1981); Veterans Regional Office, Denver, Colorado, 10 FLRA No. 78; Veterans Administration, Iron Mountain, Michigan, 10 FLRA No. 79. The above cited cases leave no doubt that an exclusive representative is entitled to information which is necessary and relevant to processing a grievance and that the exclusive representative's right to receive and an agency's obligation to furnish such information is derived from section 7114(b)(4) of the Statute. Refusal to supply such information may, therefore, be violative of section 7116(a)(1), (5) and (8), if it is established that the requested information is necessary and relevant for the exclusive representative to perform its representational functions. Those functions, without question, include the processing of employee grievances.

The request for information in this case involved performance evaluations of approximately 10-12 staffing clerks located in the same work unit as the grievant. The Union representative who requested the information testified that it was needed for several reasons including consideration of the highly unusual circumstance of an employee's performance deteriorating markedly after a promotion; to insure that the

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grievant was not treated differently than other employees since she had been active in the Union and a Union steward; and to generally determine if arbitration of the grievance was warranted. The latter reason being highly significant, particularly since the grievance had already gone through several stages and as part of its representational function an exclusive representative has an affirmative obligation, in my view, to determine whether or not a grievance it may be pursuing has merit or warrants further action on its part. Such consideration is essential if the exclusive representative is to function effectively in its role.

Respondent's reply to the request for these performance evaluations was based on its unilateral observation that "we have determined that the information you have requested is neither relevant nor necessary as outlined in 5 U.S.C. 7114(b)(4). Consequently, we feel that we have no obligation to provide you with the information you have requested."

Respondent argues that the information was not relevant on a twofold theory combining management's rights to evaluate its employees and upon its interpretation of the Privacy Act of 1974. The Privacy Act issue has long been resolved by the agencys administering federal labor-management relations laws. The case law establishes that an individual's rights to privacy of his records must be balanced against the conflicting rights in each case. Where, as here, the right of an exclusive representative to adequately perform its representational functions as well as the broad public interest in having the Federal government operate within its merit promotion system so that its employees are given equitable treatment, while encouraging the use of non-disruptive grievance procedures the exclusive representative's right has been held to outweigh an employee's loss of privacy. Veterans Administration Regional Office, Denver, Colorado, supra. See also, Department of the Treasury, Internal Revenue Service, 8 A/SLMR 112 (1978). In this matter, Respondent has offered no reason to disturb that balance. Furthermore, Respondent offered no cogent reason why the privacy of individual employees could not be maintained through already developed methods such as sanitizing those records. In such circumstances, it is be found that the conflicting rights established under the Privacy Act do not, in this case, outweigh the rights of the exclusive representative to perform its representational functions.

Accordingly, it is found that the Charging Party Union established the relevancy and necessity of the requested information and Respondent's denial of the information based on its determination that the information requested was neither relevant nor necessary violated section 7116(a)(1), (5) and (8) of the Statute.

Then Respondent contends that supplying the requested information invades its management rights to evaluate its employees. This contention misses the point. The record is devoid of any suggestion that by furnishing the information requested by the Union would in any way encroach on management's ability to evaluate its employees. In fact the request is

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for performance evaluations which have already been made. In any event, the exclusive representative here sought information solely in connection with the processing of a particular grievance. There is no suggestion from the record that the information was sought to engage in any effort to change the agency's method of employee evaluation, but merely was to compare the past evaluations with those of the grievant in order to ascertain whether any inconsistencies existed, and to determine whether it would pursue this particular grievance any further. Certainly the Union's action was entirely consistent with its legitimate function as exclusive representative and does not suggest any attempt to infringe on a management perogative as Respondent suggests. In short, Respondent's argument established no connection between furnishing this information and any infringement on its right to evaluate employees. Without such a connection this argument must be rejected.

Respondent also raises a question regarding application of its Notice of Systems of Record which it claims prohibits disclosure of the requested information unless it is relevant and necessary, is also premised on the distinction it draws between grievances and negotiations. Admittedly, the routine use exception*/ cited by Respondent provides an exception to the Privacy Act when the information sought is "relevant and necessary to their duties as exclusive representative". Respondent's own regulations provide an exception allowing the exclusive representative to obtain information such as requested here. The Authority repeatedly has held that such information must be supplied to the exclusive representative where it is relevant and necessary under section 7114(b). The very law upon which Respondent relies and Authority precedent permits disclosure to an exclusive representative of exactly the type information sought by the Union to "resolve disputes under a negotiated grievance procedure." Thus, even under the routine use exception the information if relevant and necessary should be provided to the exclusive representative.

However, Respondent contends that it has retained authority under the Privacy Act to make reviews of initial agency determinations regarding access to and amendments to records in those systems under 5 C.F.R. 297.101(a)(3). Thus, Respondent urges that it alone must make the

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*/ 47 F.R. 3234, January 22, 1982, and compilation at 47 F.R. 1649.3, April 16, 1982:

> (e) To disclose information to an arbitration to resolve disputes under a negotiated grievance procedure or to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation.

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determination of what is relevant and necessary. Seemingly, this would be so, even where it is engaged in administering a system involving a grievance with its own employees. Such a theory, if adopted, would deprive the exclusive representative of its statutory right to have such information furnished and indeed disrupts the balance of rights. Under such an approach Respondent need not take into consideration criteria which the Authority might use in deciding whether or not the particular information sought is relevant and necessary. Respondent's argument notwithstanding the balance of individual rights versus those of the exclusive representative must be weighed. A review of the legislative history of the Statute and the Statute itself reveals no restrictions such as proposed by Respondent on the Authority in making its determinations. It is, therefore, found that the routine use exceptions, particularly where employees of the administering agency are involved infringes on the Authority's duty to determine relevancy and necessity of requested information in unfair labor practice situations. To the extent that it conflicts with the Authority's rules and regulations, I find the routine use exception inapplicable. In sum, it is found that the routine use exception not only does not bar disclosure of the information requested here, but it supports the exclusive representative's assertion that it is entitled to be provided information which it is necessary and relevant for the purpose of processing a grievance.

Based on the foregoing, it is concluded that Respondents refusal to furnish the exclusive representative herein with information which was necessary and relevant to processing a grievance violated section 7116(a)(1), (5) and (8) of the Statute. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations of section 7118 of the Statute, it is hereby ordered that the United States Office of Personnel Management, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to provide, American Federation of Government Employees, Local 32, AFL-CIO, the employees' exclusive representative, requested data which is necessary and relevant to enable such exclusive representative to perform its representational duties in connection with an employee's grievance.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) We will provide, upon request to the American Federation of Government Employees, Local 32, AFL-CIO, the employees exclusive representative requested data which is necessary and relevant to enable it to perform its representational duties inconnection with an employees grievance.

(b) Post at its facilities in Washington, D.C., copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: February 23, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the American Federation of Government Employees, Local 32, AFL-CIO, the employees' exclusive representative, requested data which is necessary and relevant to enable such exclusive representative to perform its representational duties in connection with an employee's grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL provide upon request to the American Federation of Government Employees, Local 32, AFL-CIO, the employees' representative requested data which is necessary and relevant to enable it to perform its representational duties in connection with an employees' grievance.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, N.W., Suite 700, Washington, D.C., 20033-0758, and whose telephone number is: (202) 653-8507.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
(DANBURY, CONNECTICUT)

Respondent

and

Case No. 1-CA-20137

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON
LOCALS C-33, LOCAL 1661, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Exceptions to the Judge's Decision were filed by the Respondent. Both the General Counsel and the Charging Party filed oppositions to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

The Judge found that the Respondent maintained a rule prohibiting its employees from releasing information to the press and requiring that all inquiries by members of the media be referred to the prison warden for response. When an employee, acting in his capacity as a union representative, gave an interview to a newspaper reporter concerning the possibility of impending staff reductions, the Respondent admonished the employee for having done so and cautioned him concerning the release of similar information in the future. The Judge concluded, and the Authority agrees, that the Respondent's conduct, to the extent that it interfered with the right of an employee, acting in a representative

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capacity, to state the views of a labor organization on matters affecting unit employees' terms and conditions of employment, interfered with the exercise of employee rights guaranteed by section 7102 of the Statute.*/ In this regard, the legitimate conduct of an employee, who, acting in his representative capacity, seeks to publicize, through contacts with the media, issues having a direct bearing upon the working conditions of unit employees, enjoys the protections of the Statute. See Veterans Administration, Veterans Administration Medical Center, Shreveport, Louisiana, 5 FLRA 216 (1981).

This is not to say that the right of an employee acting in the capacity of a union representative to communicate information to the press, the general public, or other interested parties, is an unfettered one. See, e.g., United States Forces Korea/Eighth United States Army, 11 FLRA 434, n. 3 (1983); United States Forces Korea/Eighth United States Army, 17 FLRA No. 102 (1985). Thus, in reaching our conclusion herein, we have considered the Respondent's mission as a penal institution and its contention that in certain circumstances the release of information to outside parties could prejudice the maintenance of security and order within such an institution. The Authority notes in this regard that the information at issue in the instant case only served to confirm reports of anticipated temporary staff reductions which a newspaper reporter

*/ Section 7102 of the Statute provides:

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

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had already obtained from other sources. Moreover, there is no showing that the information was, on its face, so sensitive as to pose a threat to the continuing security or safety of the institution.

Accordingly, and in the circumstances of this case, the conduct of Respondent's officials in applying a policy statement concerning employee press contacts so as to proscribe the right of a union official to act in his representative capacity infringed upon the exercise of rights guaranteed employees by section 7102 of the Statute and thus violated section 7116(a)(1) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, shall:

1. Cease and desist from:

(a) Admonishing or otherwise interfering with, restraining, or coercing Clifford S. Steenhoff, or any other employee, in the exercise of the right to assist American Federation of Government Employees, Council of Prison Locals C-33, Local 1661, AFL-CIO, the employees' exclusive representative, including the right to state to the press the views of the Union concerning terms or conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind its memorandum to Mr. Clifford S. Steenhoff, dated November 25, 1981.

(b) Post at its facilities in Danbury, Connecticut, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Such forms shall be signed by the Warden, Federal Correctional Institution, Danbury, Connecticut, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be

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taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 24, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT admonish or otherwise interfere with, restrain, or coerce Clifford S. Steenhoff, or any other employee in the exercise of the right to assist American Federation of Government Employees, Council of Prison Locals C-33, Local 1661, AFL-CIO, the employees' exclusive representative, including the right to state to the press the views of the Union concerning terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of any right under the Statute.

WE WILL rescind the memorandum to Mr. Clifford S. Steenhoff, dated November 25, 1981.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116, and whose telephone number is: (617) 223-0920.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION (DANBURY, CONNECTICUT) Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS C-33, LOCAL 1661, AFL-CIO Charging Party	Case No.: 1-CA-20137

Ronald L. Brown, Esquire
Ms. Martha Jordan
For the Respondent

Gerard M. Greene, Esquire
On Brief: Richard D. Zaiger, Esquire
For the General Counsel

Mr. Clifford S. Steenhoff
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1]/ and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., was initiated by a charge filed on March 2, 1982 (G.C.

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(1) will be referred to simply as "16(a)(1)".

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Exh. 1A), a First Amended Charge, filed on April 5, 1982 (G.C. Exh. 1C) and a Second Amended Charge, filed on May 24, 1982 (G.C. Exh. 1E). The Complaint and Notice of Hearing issued on July 26, 1982, for a hearing on a date, time and place to be determined (G.C. Exh. 1G). On September 3, 1982, a Further Notice of Hearing issued setting the hearing for November 10, 1982, at 1:00 p.m. at a place to be determined in Hartford, Connecticut (G.C. Exh. 1I). Subsequently, the time of hearing was changed to 9:00 a.m. and the National Guard Armory was designated as the place for the hearing, pursuant to which a hearing was duly held on November 10, 1982, in Hartford, Connecticut, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, December 10, 1982, was fixed as the date for mailing post-hearing briefs.[2/] Each party has timely mailed a brief, received on or before December 14, 1982, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

The Issues

The basic issue is whether an employee has a protected right under the Statute to give an interview, as an officer of the Union, to a newspaper reporter concerning matters relating to terms and conditions of employment, specifically, a possible RIF as the result of the Presidential veto of the FY 1982 budget. Secondarily, whether, if the right to give such an interview is generally protected conduct, the Regulation of the Federal Prison System, which provides, in essence, that only the Warden may issue Press Releases, precluded the interview in question?

Findings

1. In November, 1981, Respondent was confronted with an all too familiar money crisis as the result of the President's veto of the FY 1982 budget and the failure of Congress to override the veto and/or to pass an appropriations measure acceptable to the President. Faced with a possible lapse of appropriations, Respondent undertook plans to meet such contingency, including plans for a RIF. The Warden, and other officials of Respondent, met with the President of Local 1661, Mr. Clifford Steenhoff, with regard thereto at various times on November 23, 1981.

2. During the course of the day, Mr. Steenhoff, on November 23, 1981, received a call, as President of Local 1661, from a reporter for the Danbury News Times who stated that he understood that the Prison was going

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2/ General Counsel's motion for extension of time to file briefs was not timely filed and was denied on December 6, 1982.

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to start laying people off and asked for confirmation. Mr. Steenhoff responded that discussions were in progress in Washington[3]/ seeking a resolution by Congress of the budget question; that if there were no resolution, there might be a RIF but that no decision had been made as to who might be affected.[4]/ Mr. Steenhoff testified that, in Mr. Scott Miller's office, he told Mr. Miller and the Warden that he had received a telephone call from a reporter and that he ". . . probably told them what the nature of the call was about, the layoffs" (Tr. 7) and they made no comment (Tr. 7).

3. The News Times in its November 23, 1981, issue carried an article about the possible layoff at the prison, including, with attribution, the telephone interview with Mr. Steenhoff (G.C. Exh. 2).

4. By memorandum dated November 25, 1981, the Warden, Mr. Robert A. Gunnell, advised Mr. Steenhoff that his conduct in giving an interview was "not appropriate and in fact was in violation of Federal Prison System [FPS] policy" and instructed Mr. Steenhoff to "refrain from giving similar press releases in the future and maintain compliance with Bureau policy." (G.C. Exh. 3).

5. Subsequently, in late January or early February, 1982, Warden Gunnell, in a meeting with Mr. Steenhoff, told Mr. Steenhoff that he could not make any press releases under current Bureau policy (Tr. 12, 27).

6. The regulations are found in 5 C.F.R. § 540.60, et seq.; however, the document relied upon by Respondent is a Program Statement, subject, "Contact with News Media", No. 1480.2, July 16, 1979, which provides, in part, as follows:

"Program Statement

"Effective Date: August 1, 1979

"1. [Purpose and Scope § 540.60. The Bureau of Prisons recognizes the desirability of establishing a policy that affords the public information about its operations via the news media. Representatives of the news media (see § 540.2) may visit institutions for the purpose of preparing reports about the institution, programs, and activities. It is not the intent of this rule to provide publicity for an inmate or special

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3/ Mr. Steenhoff had contacted the offices of various Senators and Congressmen and an official of the Council of Prison Locals. This conduct is not in question.

4/ Mr. Steenhoff's response was wholly circumspect and there is no assertion that he divulged any privileged information.

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privileges for the news media, but rather to insure a better informed public. The Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure the orderly and safe operation of the institution.][5/]

. . .

"8. Release of Information § 540.65.

"[(a) The Warden shall promptly make announcements stating the facts of unusual, newsworthy incidents to local news media. Examples are deaths, inside escapes, and institution emergencies.]

. . .

"The Warden of each institution, or his designated representative, is solely responsible for contact with the press. Other staff members shall refer all press inquiries to the Warden or his designee.

. . ." (G.C. Exh. 4)

Conclusions

I am well aware that the Statute does not protect all rights nor remedy all wrongs. To the contrary, the rights protected by the Statute are narrowly drawn. Thus, Section 2 provides as follows:

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right -

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

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5/ Bracketed material in the Program Statement is the language of the Regulation as of June 29, 1979. The present language of § 540.60 is substantially different; however, other sections including § 540.65 have remained unchanged. No effort has been made to note changes in the Regulations since only the Program Statement is relied upon.

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(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." (5 U.S.C. § 7102).

The only other provision of the Statute which treats "information"[6/] is the "proviso" to 16(b)(7) which provides:

"Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice." (5 U.S.C. § 16(b)).

Section 19(b)(4) of Executive Order 11491 had been held to bar all picketing, including informational picketing which did not interfere with an agency's operation, Internal Revenue Service, A/SLMR No. 536, 5 A/SLMR 475 (1975), aff'd, FLRC No. 75A-96, 4 FLRC 170 (1976). However, the order of the Assistant Secretary was vacated by the United States District Court for the District of Columbia as overly broad and an intrusion upon the right of free expression in violation of the First Amendment, National Treasury Employees Union v. Fasser, 428 F. Supp. 295 (D.C.D.C. 1976), see, in relation thereto, FLRC No. 76P-4, 5 FLRC 991 (1977); Complaint in Case No. 536 dismissed, A/SLMR No. 783, 7 A/SLMR 58 (1977); and, in direct recognition of the decision of the District Court, Congress inserted to above "proviso" to insure that informational picketing which does not interfere with an agency's operations is not banned, i.e., shall not be "considered as an unfair labor practice."

The substance of Section 1(a) of Executive Order 11491 was unchanged from the language of Section 1(a) of Executive Order 10988. In Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968), the Court of Appeals stated, as to Section 1(a) of Executive Order 10988, as follows:

"It suffices in the present case to point out that Executive Order 10988, by its clear language, has no application to appellant's activities.[7/] The pertinent provisions, entitled 'Employee-Management Cooperation in the Federal Service' reads as follows:

"Section 1(a) Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal . . . to

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6/ I am, also aware of the provisions of § 16(e) concerning the "expression of any personal view, opinion of the making of any statement". See, Oklahoma City Air Logistics Center (AFLC) Tinker Air Force Base, Oklahoma, 6 FLRA No. 32, 6 FLRA 159 (1981).

7/ Appellant Meehan had been, when the matter arose, President of the Canal Zone Police Lodge 1798, American Federation of Government Employees.

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participat[e] in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress or other appropriate authority. (Emphasis supplied).

The regulation by its terms provides for presentations within official channels, and establishes no special warrant for appeals to the public." (392 F.2d at 829)(Emphasis by the Court).

In Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, Las Vegas, Nevada, Case No. 72-5388 (CA)(7 A/SLMR 151, 157 (1976)), I held, in part, as follows:

". . . As the Court stated in Meehan . . . the pertinent language of Section 1(a) of the Order provides for presentations within official channels and establishes no special warrant for appeal to the public. . . ."

The Assistnat Secretary adopted my findings, conclusions and recommendation, A/SLMR No. 796, 7 A/SLMR 150 (1977), but, in footnote 1, noted as follows:

"1. This is not to say . . . that all appeals to the public are not protected under Section 1(a) of the Order . . ." (7 A/SLMR at 151) [citing Fasser, supra, and FLRC No. 76P-4, supra].

Section 1 of Executive Order 11491 was essentially like § 2 of the Statute and the Supreme Court in considering the freedom of speech aspect of the content of a union publication under Section 1 of the Executive Order, in Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974), stated, in part, as follows:

". . . we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for union speech which has long characterized our labor relations in the private sector has been carried over under the Executive Order. . . (418 U.S. at 275)

"The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' right 'to form, join, or assist labor organizations.'[12]/

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12. In other contexts, other provisions of the NLRA may be sources of protection for union freedom of speech. For example, one such source would be the system of repre-

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sentation elections by secret ballot established by § 9 of the Act. Wide latitude for what is written and said in election campaigns is necessary to insure the free exchange of information and opinions, and thus to promote the informed choice by employees needed to make the system work fairly and effectively. The same policy is applicable under the Executive Order, which establishes in § 10 a similar system of representative elections for public employees.

'Basic to the right quaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. Indeed, even before the Norris-LaGuardia Act and the Wagner Act, this Court recognized a right of unions to "use all lawful propaganda to enlarge their membership"' NLRB v. Drivers Local 639, 362 U.S. 274, 279 (1960) (citations omitted).

Vigorous exercise of this right 'to persuade other employees to join' must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact. Thus, the Board has concluded that statements of fact or opinion relevant to a union organizing campaign are protected by § 7, even if they are defamatory and prove to be erroneous, unless made with knowledge of their falsity . . .

These considerations are equally applicable under the Executive Order. Section 1 of the Order guarantees federal employees these same rights.13/

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13. Section 1 of the Executive Order does not grant federal employees the right, guaranteed by § 7 of the NLRA for employees in the private sector, 'to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' [Nor, of course, does § 2 of the Statute which is essentially like Section 1 of the Order]. The right to attempt to persuade others to join the union, however, is derived from the rights to form, join, and assist a union, as well as from the right to engage in concerted activities. The absence of mention of a right to engage in concerted activities is obviously no more than a reflection of the fact that the Order does not permit federal employee unions to engage in strikes or picketing. The prohibition of picketing and the lack of protection for concerted activities might be thought to indicate an intention in the Executive Order to regulate the location or form of employee speech to a somewhat

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greater extent than under the NLRA, but we do not perceive any intention to curtail in any way the content of union speech." (418 U.S. at 278)

. . .

"As noted, one of the primary reasons for the law's protection of union speech is to insure that union organizers are free to try peacefully to persuade other employees to join the union without inhibition or restraint. . . . We see no reason to limit this protection to statements made during representation election campaigns. The protection of § 7 and § 1 is much broader. Indeed Linn itself [Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966)] involved union organizing activity outside the election campaign context. We similarly reject any distinction between union organizing efforts leading to recognition and post-recognition organizing activity. Unions have a legitimate and substantial interest in continuing organizational efforts after recognition. Whether the goal is merely to strengthen or preserve the union's majority, or to achieve 100% employee membership - a particularly substantial union concern where union security agreements are not permitted . . . these organizing efforts are equally entitled to the protection of § 7 and § 1." (418 U.S. at 277-279).

Decisions under the National Labor Relations Act concerning, inter alia, statements to media, Community Hospital of Roanoke Valley, 220 NLRB 217, 90 LRRM 1440 (1975), enf'd 538 F.2d 607, 92 LRRM 3158 (4th Cir. 1976), cf., Bowling Green Manufacturing Company v. NLRB, 416 F.2d 371, 72 LRRM 2301 (enf't denied, 6th Cir. 1969); newspaper articles, etc., United Parcel Service, Inc., 234 NLRB 223, 97 LRRM 1212 (1978); Springfield Library and Museum Association, 238 NLRB 1672, 99 LRRM 1289 (1979), cf., Jefferson Standard Broadcasting Company, 94 NLRB 1507, 28 LRRM 1215 (1951), aff'd sub nom., NLRB v. Local 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953), Kaiser Engineers v. NLRB, 538 F.2d 1379, 92 LRRM 3153 (9th Cir. 1976); American Arbitration Association, Inc., 233 NLRB 71, 96 LRRM 1431 (1977), are bottomed on "concerted activities" of § 7 of the NLRA, which, as noted above, is not a right accorded federal employees under § 2 of the Statute and, accordingly, such decisions are not directly in point except to the extent like rights are accorded by the provisions of § 2, ". . . to form, join, or assist any labor organization. . . ."

The phrase "or other appropriate authorities", with respect to presenting the "views of the labor organization" first appeared in E.O. 10988, January 17, 1962 (2 U.S. Code Cong. & Adm. News 4269, 87th Cong. Second Sess. 1962); was carried over into E.O. 11491, October 29, 1969, which revoked E.O. 10988; was retained without change or comment in the

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various admendments to E.O. 11491;[8]/ and now appears in §2 of the Statute. Nothing in the legislative history of the Statute sheds any light on the meaning of the phrase, "or other appropriate authorities". In Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, Case Nos. 50-15408(CA) and 50-15412(CA), I held that the right of employees to appear, on their own time, at a meeting of the City Council on behalf of the union, to announce the impending removal of the hospital director and to encourage expression of support for the director by the public, was protected under Section 1(a) of the Order (8 A/SLMR 434, 440-441). The Assistant Secretary adopted my findings and conclusions without further discussion of Section 1(a) of the Order, Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, A/SLMR No. 1024, 8 A/SLMR 430 (1978). Local 3254, American Federation of Government Employees, AFL-CIO and Department of the Air Force, Grissom Air Force Base, Peru, Indiana, A/SLMR No. 852, 7 A/SLMR 486 (1977), set aside, FLRC No. 77A-77, 6 FLRC 406 (1978), complaint dismissed, A/SLMR No. 1057, 8 A/SLMR 640 (1978), is not directly in point as the sole basis for the violation found by the Assistant Secretary, which was set aside by the Council, was that Section 19(a)(3) of the Order prohibited agency management from providing assistance to a labor organization not in equivalent status by permitting publication of an advertisement in a newspaper controlled by the agency; however, it was recognized that, absent the "equivalent status" strictures, publication of the same advertisement would have been protected and as to the "equivalent status" strictures, the Council held that, ". . . a finding of a 19(a)(3) violation based merely on the failure to prevent the publication of the subject advertisement . . . is inconsistent with the purposes of the Order." (6 FLRC at 412-413).

Veterans Administration, Veterans Administration Medical Center, Shreveport, Louisiana, 5 FLRA No. 27 (1981), did, directly, involve a union steward's interview by a TV reporter. With respect thereto, I had held,

> "The term 'other appropriate authorities' is not defined in the Act, but I have no doubt that such term includes reporters, whatever the medium. Otherwise, employees acting in the capacity of a representative of a labor organization would be denied protection under the Statute when presenting the views of the labor organization to the press, a result clearly not contemplated by Congress. . . Accordingly, I conclude that Respondent's act of

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[8]/ Section 1(a) of E.O. 11491 provided, in relevant part:

> ". . . Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to . . . presentation of its views to officials of the executive branch, the Congress, or other appropriate authorities. . . ."

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disciplining Ms. Lucas in retaliation for her activity, as a representative of the Union, in contacting a television reporter and giving a television interview violated § 16(a)(1). Further, the discriminatory and disparate treatment of the Union's Chief Steward, Ms. Lucas, constituted action . . . in violation of § 16(a)(2) of the Statute." (6-CA-261 at pp. 7-8).

The Authority affirmed the finding of violation but stated,

> "In reaching its determination herein the Authority adopts the Administrative Law Judge's conclusion that Respondent's reprimand of Lucas was in retaliation for her activity as a representative of the Union and that the expressed reason for such discipline was pretextual. Under such circumstances the Authority finds it is unnecessary to pass upon, and specifically does not adopt, the Administrative Law Judge's conclusion at p. 7 of his Decision that the language 'other appropriate authorities' in section 7102(1) of the Statute applies to reporters. Accordingly, the Authority concludes that the Respondent's reprimand of Lucas interfered with, restrained and coerced her in violation of section 7116(a)(1) of the Statute and such discipline constitutes discrimination in connection with her conditions of employment in violation of section 7116(a)(2) of the Statute." (5 FLRA No. 27) (Emphasis supplied).

It is entirely possible that the Authority, by its refusal to decide whether "other appropriate authorities" in § 2(1) of the Statute applies to reporters, implicatively rejected inclusion of reporters in the language "other appropriate authorities". Certainly, the issue was directly raised in the Medical Center case, supra, but the Authority declined to decide the issue and quite specifically did not adopt my conclusion that the language "other appropriate authorities" in § 2(1) applies to reporters. On the other hand, while the Authority did not decide the issue in the Medical Center case, supra, it stated that it did not do so because, ". . . the Authority finds it is unnecessary to pass upon . . . the Administrative Law Judge's conclusion . . . that the language 'other appropriate authorities' in section 7102(2) of the Statute applies to reporters." In avoiding decision of an unnecessary issue, the Authority not only demonstrated judicious discretion but followed an honored judical tenet, see, for example, United States v. O'Brien, 391 U.S. 367, 386 (1968).

Here, the issue of an employee-union officer's statement to the press is the controlling issue. I have carefully reviewed all of the foregoing decisions, including the decision of the Court of Appeals for the District of Columbia Circuit in Meehan v. Macy, supra, my decision based thereon, in Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, supra, the Assistant Secretary's qualifying footnote, thereto, supra, and the decision in Veterans Administration, Veterans Administration Medical Center, Shreveport, Louisiana, supra, and conclude

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that I was in error, in the Medical Center case, supra, in holding that, "The term 'other appropriate authorities' . . . includes reporters, whatever the medium. . . ." (6-CA-261). Accordingly, I conclude, as I held in Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, supra, and as the Court of Appeals had held in Meehan v. Macy, supra, with respect to the identical language of E.O. 11491 and E.O. 10988, that the language of § 2 of the Statute, as had Section 1 of E.O. 10988 and of E.O. 11491, provides for presentations within official channels and establishes no special warrant for appeal to the public. This is not to suggest that all appeals to the public are unprotected by the Statute. To the contrary, as the Supreme Court stated, in Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, supra, with respect to E.O. 11491, which language was carried over to Section 2 of the Statute without change,

> "'Basic to the right guaranteed to employees in § 7 [of the NLRA] to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. . .' (418 U.S. at 477)

These considerations are equally applicable under the Executive Order. Section 1 of the Order guarantees federal employees these same rights.[13]/ (418 U.S. at 478)

> "13. . . . The right to attempt to persuade others to join the union, however, is derived from the right to form, join, and assist a union, as well as from the right to engage in concerted activities. The absence of mention of a right to engage in concerted activities is obviously no more than a reflection of the fact that the Order does not permit federal employee unions to engage in strikes or picketing. The prohibition of picketing and the lack of protection for concerted activities might be thought to indicate an intention in the Executive Order to regulate the location or form of employee speech to a somewhat greater extent than under the NLRA, but we do not perceive in any way any intent to curtail in any way the content of union speech." (418 U.S. at 478, n. 13).

". . . We see no reason to limit this protection to statements made during representation election campaigns. The protection of § 7 and § 1 is much broader . . . Whether the goal is merely to strengthen or preserve the union's majority, or to achieve 100% employee membership - a particularly substantial union concern where union security agreements are not permitted . . . these organizing efforts are equally entitled to the protection of § 7 and § 1." (418 U.S. at 479).

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I am well aware that the Supreme Court, in Austin, supra, limited its comments to organizing efforts of a union. Certainly, it could be argued that the protection of union speech under Section 1 of the Executive Order, and now under § 2 of the Statute, flowing from the right, "to form, join, or assist any labor organization" extends only to union membership activities, which was not present in this case; however, I do not believe that the right of union speech is limited, merely, to membership activities. Thus, in Veterans Administration Regional Office, Denver, Colorado, 2 FLRA No. 106, 2 FLRA 854 (1980), the Authority adopted the conclusions of Judge Chaitovitz, in part, that:

> ". . . Section 1 of the Order grants each employee the right to join and assist a labor organization. If the employees are to have the right to join and assist a labor organization and to be effectively represented by such a labor organization, the employees must be free from interference to manage the labor organization and to engage in all conduct which is permissible for the labor organization. . . ." (2 FLRA at 863).

In addition, the "proviso" to § 16(b)(7) of the Statute expressly permits informational picketing "which does not interfere with an agency's operations"; and § 16(e) of the Statute, under stated conditions, protects "The expression of any personal view, argument, opinion or the making of any statement . . . if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions. . . ." See, Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, supra; American Federation of Government Employees, Local 2000, AFL-CIO v. William R. Massengale, Case Nos. 6-CO-37 and 6-CO-38, OALJ-82-52 (February 24, 1982).

Moreover, as the right, set forth in § 2 of the Statute, ". . . to form, join, or assist any labor organization. . . ." protects employee speech, as the Supreme Court stated in Austin, supra, and as the Authority necessarily recognized in Veterans Administration, Veterans Administration Medical Center, Shreveport, Louisiana, supra, i.e., ". . . Respondent's reprimand of Lucas was in retaliation for her activity as a representative of the Union. . . .", Mr. Steenhoff's statement to the press, as President of the Union, was protected activity as a representative of the Union unless specifically proscribed by applicable regulations, notwithstanding that the language in § 2(1) of the Statute, ". . . other appropriate authorities" does not include "reporters", i.e., the enumeration of rights set forth in § 2(1) is not coextensive with the right of "Each employee . . . to form, join, or assist any labor organization. . . ." but is merely illustrative of rights included therein.

While an employee has a protected right under § 2 of the Statute to communicate the views of the labor organization concerning terms and conditions of employment of the bargaining unit, such right is not without limitation. As Judge Chaitovitz further noted, in Veterans Administraion Regional Office, Denver, Colorado, supra,

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". . . this does not give employees license, because they may also be union officials, to engage in any conduct they wish, and be insulated from discipline. Rather . . . that the employees are protected when engaging in reasonable conduct as union representatives because they were engaging in union conduct which was protected by the Order. . . ." (2 FLRA at 863).

And as the Supreme Court noted in Austin, supra, with regard to Section 1 of Executive Order 11491,

". . . the lack of protection for concerted activities might be thought to indicate an intention in the Executive Order to regulate the location or form of employee speech to a somewhat greater extent than under the NLRA. . . ." (418 U.S. at 278).

In this case, the General Counsel concedes the validity of Repsondent's Program Statement (Tr. 22, 24) but, challenges ". . . the application of the regulation. . . ." (Tr. 24) and as stated in his Brief, ". . . it is perfectly clear that Warden Gunnell's broad proscription to Steenhoff precluding him from issuing any information to the press under any circumstances constituted interference with a basic right under the Statute. . . ." (G.C. Brief, p. 4) (Emphasis in original).

5 C.F.R. § 540.65, which is included in the Program Statement provided, in part, that:

"(a) The Warden shall promptly make announcements stating the facts of unusual, newsworthy incidents to local news media. Examples are deaths, inside escapes, and institution emergencies.

"(b) The Warden shall provide information about an inmate that is a matter of public record . . .

"(c) Information in paragraphs (b)(1) through (8) . . . may not be released if confidential for protection cases.

"(d) A request for additional information concerning an inmate . . . is referred to the Public Information Officer, Central Office, Washington, D.C.

"(e) The Public Information Officer . . . shall release all announcements related to:

(1) Bureau of Prisons policy;

(2) Changes in an institutional mission;

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(3) Type of inmate population; or

(4) Changes in executive personnel."

(5 C.F.R. § 540.65, effective August 1, 1979).

5 C.F.R. § 540.60, set forth in full hereinabove, contained the sentence,

> ". . . The Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure the orderly and safe operation of the institution."9/ (5 C.F.R. § 540.60, effective August 1, 1979).

The Program Statement contains the following, which does not appear in the Regulation:

> "The Warden of each institution, or his designated representative, is solely responsible for contact with the press. Other staff members shall refer all press inquiries to the Warden or his designee." (Program Statement 1480.2, G.C. Exh. 4).

Obviously, the stated purpose and scope of the Program Statement, inter alia, ". . . to protect the privacy and other rights of . . . members of the staff" does not purport to extend to statements of the views of the Union concerning terms or conditions of employment in general, which involve no question of privacy; nor does the statement that, ". . . an interview in an institution must be regulated to insure the orderly and safe operation of the institution", have any application to such general statements by the Union. Literally, the provisions of the Program Statement that, "The Warden . . . is solely responsible for contact with the press. Other staff members shall refer all press inquiries to the Warden. . . .", would preclude any employee from any contact with the press, but, even literally applied, would have no application to a non-employee Union representative. As Judge Chaitovitz stated in Veterans Administration Regional Office, Denver, Colorado, supra,

> ". . . It would seem strange, in effect, to require that for labor organizations to engage in protected activities it must use non-employees. Such a result would totally

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9/ § 540.60 now consists, in its entirety, of the language set forth in the two concluding sentences set forth above.

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frustrate the employees' right to effective representation which they themselves could control. . .

. . .

"Having concluded that employee-union officials, when acting in their union representative capacity, must be free to engage in any activity the union is privileged to engage in . . . it is concluded . . . that the employees are protected when engaging in reasonable conduct as union representatives because they were engaging in union conduct which was protected. . . ." (2 FLRA at 863) (Emphasis in original).

Respondent, in its Brief, asserts, inter alia, that ". . . the Federal Prison System is not bound by or forced to accede to another agency's interpretation of its own regulation" (Res. Brief, p. 4). Nevertheless, when an agency's interpretation and application of its own regulations interfers with a right protected by the Statute, the Authority can, and must, in order to insure that rights accorded by the Statute are protected, declare that such regulations may not be enforced in a manner which interfers with rights protected by § 2 of the Statute. Here, Respondent's Program Statement, literally, precludes employees from any contact with the press, but does not purport to limit in any manner contact by the Union, through non-staff members [employees], to the press. I fully agree with the conclusion of Judge Chaitovitz in Veterans Administration Regional Office, Denver, Colorado, supra, and, therefore, conclude that Mr. Steenhoff, acting in his capacity as Union President, was protected when engaging in reasonable conduct as Union representative because he was engaging in union conduct which was protected by the Statute and which was not precluded by the Program Statement. Accordingly, Respondent's interpretation of the Program Statement is overly broad and its admonition of Mr. Steenhoff for engaging in protected Union conduct violated § 16(a)(1) of the Statute. Under the circumstances, I neither reach nor decide the effect of an agency regulation which purports to limit, or proscribe, protected Union activity.

Having found that Respondent violated § 16(a)(1) of the Statute, I recommend that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, the Authority hereby orders that the Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, shall:

1. Cease and desist from:

(a) Admonishing or otherwise interfering with, restraining, or coercing Clifford S. Steenhoff, or any other employee, when

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acting in the capacity of an officer of American Federation of Government Employees, Council of Prison Locals C-33, Local 1661, AFL-CIO, the exclusive representative, to engage in protected union conduct, including the right to state to the press the views of the Union concerning terms or conditions of employment in general of the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Rescind its memorandum to Mr. Clifford S. Steenhoff, dated November 25, 1981.

(b) Post at its facilities in Danbury, Connecticut, copies of the attached notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Warden and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Regulations, notify the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts, 02116, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Date: January 5, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT admonish or otherwise interfere with, restrain, or coerce Clifford S. Steenhoff, or any other employee, when acting in the capacity of an officer of American Federation of Government Employees, Council of Prison Locals C-33, Local 1661, AFL-CIO, the exclusive representative, to engage in protected union conduct, including the right to state to the press the views of the Union concerning terms or conditions of employment in general of the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of any right under the Statute.

WE WILL rescind the memorandum to Mr. Clifford S. Steenhoff, dated November 25, 1981.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts, 02116, and whose telephone number is: (617) 223-0920.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES FORCES KOREA/
EIGHTH UNITED STATES ARMY

Respondent

and

Case No. 8-CA-20391

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1363

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, exceptions to the Judge's Decision were filed by the General Counsel and an opposition was filed by the Respondent.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

IT IS ORDERED that the complaint in Case No. 8-CA-20391 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 24, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES FORCES KOREA/ EIGHTH UNITED STATES ARMY Respondent	
and	Case No. 8-CA-20391
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1363 Charging Party	

E. A. Jones, Esquire
For the General Counsel

Lt. Colonel Michael L. Feighny
For the Respondent

Mr. Don C. Terrill
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder, Fed. Reg., Vol. 45, No. 12, January 17, 1980 and Vol. 46, No. 154, August 11, 1981, 5 C.F.R. Chapter XIV, Part 2411, et seq.

Pursuant to charge filed on July 7, 1982, by Local 1363, National Federation of Federal Employees (hereinafter called NFFE or the Union), a Complaint and Notice of Hearing was issued on September 30, 1982, by the Regional Director for Region VIII, Federal Labor Relations Authority, Los

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Angeles, California. The Complaint alleges that the United States Forces Korea/Eighth United States Army (hereinafter called the Respondent), violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by virtue of its actions in issuing a formal reprimand to Mr. Don Terrill because he engaged in "union activity protected by 5 U.S.C. 7102."1/

A hearing was held in the captioned matter on November 8, 1982, in Seoul, Korea. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on January 10, 1983, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Statement of Fact

Mr. Don C. Terrill, the alleged discriminatee herein, has been employed as a computer programmer analyst by the U.S. Navy and assigned to Respondent's Joint Command Information Systems since approximately 1977. Since March of 1979, Mr. Terrill has served as either president or vice-president of the Union which represents approximately 450 of the approximately 1,100 U.S. citizen civilian employees working for the Respondent in Korea. At the time of the events herein, and for an unspecified time prior thereto, Mr. Terrill was the president of the Union.

Mr. Terrill's position as union president include presiding at general membership meetings and representing the Union at all functions where the Union needs a spokesman, such as negotiations with the Respondent. Mr. Terrill is also responsible in his position as union president, for the Union's correspondence with Respondent as well as the publication of the Union's monthly newsletter.

The Union's newsletter contains national (U.S.) and local Korean news which is of interest to bargaining unit employees. Additionally, the Union newsletter contains a "general mixture of editorializing which is often critical of the command's personnel policies. The newsletter is generally distributed to dues paying members of the Union; U.S. civilian employees in Korea; Federal employee unions in Okinawa, Germany, and NFFE's national office; the Korea Herald; the Korea Times; the Stars and

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1/ Mr. Terrill's alleged protected activity consisted of writing a letter on union stationery, in his capacity as union president, to a local Korean newspaper.

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Stripes; the editors of KORUS, Respondent's own newspaper; the Southern Star, another of Respondent's newspapers; Korean employee unions that represent Korean employees in Korea; and Respondent's Civilian Personnel Officer. Additionally, Mr. Terrill has from time to time sent either copies of the newsletter or other letters on Union stationery to members of Congress, the President of the U.S., 60 Minutes, MASH, the Washington Post, Jack Anderson, and the Office of Personnel Management. The aforementioned letters, some 1,200 in number, which were written on Union stationery and signed by Mr. Terrill in his capacity as union president, like the Union's newspaper, were highly critical of Respondent's policies with respect to the civilian employees in Korea.

The record reveals that Mr. Terrill is empowered to author the letters as union president without any prior approval from either the International Office of the Union, his fellow officers or the Local 1363 executive board.

Although not entirely clear from the record, it appears that sometime around April of 1982, General John A. Wickham, Jr., who at the time was Commander in Chief, U.S. Forces in Korea, was accused by the Christian leaders in Korea of making a speech or statement in the past wherein the Korean people were referred to as "lemmings" who were willing to follow any leader they get. The aroused Christian leaders demanded and/or urged that General Wickham be recalled for making such a statement about the Korean people. A story concerning the alleged insulting remark of the General was published in a number of Korean newspapers and subsequently the story was picked up by one or more United States newspapers. The accusations made by the Christian leaders concerning General Wickham appeared in a story involving arson at the U.S. Pusan Cultural Center. The article indicates that a bitter dispute existed with respect to the philosophies of the Government and the Christian leader. According to Mr. Terrill, it was from the American Newspapers that he became aware of the alleged incident involving the General.2/

Upon hearing of the complaints by the Christian leaders in Korea, including their request for the recall of General Wickham, who because of his position was the head of the Activity in which the Union enjoyed recognition, Mr. Terrill decided that the incident would be a good vehicle for the airing of a number of labor relations complaints that the Union had with the United States Forces in Korea, which was commanded by General Wickham. To this end, Mr. Terrill, in his capacity as union

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2/ On April 20, 1982, the Korean Times reported that the U.S. Forces Korea Public Affairs Office had informed the Korean Times that General Wickham had never made the alleged remark. Terrill, who is credited, denied knowledge of General Wickham's denial prior to writing the letter quoted infra.

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president, on April 22, 1982, wrote a letter on Union stationery to the editor of the Korea Herald which read as follows:3/

Dear Sir:

I am writing on behalf of a labor Union which represents most of the U.S. citizen civilian employees of U.S. Forces Korea (USFK).

We have read in the Pacific Stars & Stripes (published by the U.S. Department of Defense) that prominent Korean church leaders have requested the recall of GEN Wickham from Korea. According to those church leaders, GEN Wickham said that the Korean people are like "lemmings" who are willing to follow any leader they get. If GEN Wickham did indeed make such a statement, we apologize on behalf of American workers to the Korean people. The General is a senior representative of the United States Government in Korea, and his public statements are usually seen as statements of American policy. In this case, however, he was not stating the views of the people of the United States.

The irony is that on past occasions GEN Wickham's representatives had admonished our Union's representatives for some of the statements we have made concerning our daily lives in Korea. It appears, however, that GEN Wickham enforces two different standards.

Both the officers and the members of our Union have been continually impressed with the tremendous degree of national pride displayed by the Korean people. This unified sense of national purpose has lifted Korea out of the wreckage of war, provided a stable government, and made Korea into an economic powerhouse and a shaper of world events. We Americans have much to envy in Korea's national spirit, accomplishments, and traditions.

The American civilian employees of USFK are also extremely unhappy with GEN Wickham over his personnel policies. Were it within our power, we too would like to see him recalled to the United States. He has treated us as second-class citizens, has displayed

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3/ The letter was never published.

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little regard for basic American freedoms or for our country's labor laws, has refused to bargain with our Union over important personnel policies, has used his office for personal advantage through a policy which exempts himself and his fellow generals from USFK's severe ration control restrictions, and has sought to destory our Union through a series of improper actions including a request to President Reagan to take from our Union its statutory right to represent employees in essential personnel matters. GEN Wickham has alienated most of the civilian employees and has given USFK a reputation which is so bad that this agency has great difficulty recruiting civilians from the U.S. to come to work here, even though America is presently seized by extraordinary unemployment problems. How this man could be selected to be Vice Chief of Staff of the Army is a marvel of poor judgment. GEN Wickham will be departing this summer, or sooner if the Christian leaders prevail, and there will be no tears shed here by his civilian employees upon his departure.

Sincerely,

DON C. TERRILL
President
Local 1363, National
Federation of Federal
Employees

On or about April 26, 1982, union first vice-president, David Rydzynski, who works in the Office of the Judge Advocate, gave Major Vincent Nealey, Respondent's labor counsel, a copy of Mr. Terrill's April 22, 1982 letter to the Korea Herald and indicated that he was not in sympathy with it. Major Nealey read the letter and concluded, after talking with Mr. Rydzynski, that the letter was a malicious attack on General Wickham and did not constitute protected union activity. Thereafter, Major Nealey contacted Mr. Terrill's immediate supervisor, Major Dennis Strobel, informed him of his own personal opinion of the letter and recommended that Mr. Terrill be given a reprimand for writing such a letter.

On May 28, 1982, Major Strobel, Mr. Terrill's immediate supervisor, gave Mr. Terrill a letter of reprimand which read in pertinent part as follows:

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1. This is notice that you are formally reprimanded for making malicious statements against General John A. Wickham, Jr.

2. The specific reason for this reprimand is as follows:

On 22 APRIL 1982, you did sign and forward to the editor of The Korea Hearld the letter attached as Inclosure 1. This letter includes malicious statements against General Wickham and the National Command Authority who selected him to be the next Vice Chief of Staff of the Army. These statements include but are not limited to allegations that General Wickham:

(a) treats civilian employees as second-class citizens,
(b) displays disregard for basic American freedoms and laws,
(c) uses his office for personal advantage,
(d) uses improper methods to try to destroy the union to which you belong, and
(e) has given USFK a bad reputation.

You made these statements knowing that they could harm or destroy the reputation, authority, or official standing of General Wickham and his superiors in the chain of command.

The letter went on to inform Mr. Terrill that he could grieve the reprimand throrugh the third step of the Department of the Navy grievance procedure. In this latter connection the only evidence bearing upon the workings of the Department of the Navy's grievance procedure appears in the testimony of Mr. Lloyd Garreau, a labor relations specialist assigned to the Seoul Civilian Personnel Office. According to Mr. Garreau's testimony a grievance concerning the reprimand would be submitted in the third step of the grievance procedure to someone in the chain of command higher than the person proposing the disciplinary action. In the absence of an allegation that such person participated in the decision or had knowledge of the decision, the reviewing individual's decision in the third step of the grievance procedure would be final.

The record reveals that both prior to, and subsequent to the issuance of the reprimand on May 28, 1982, Mr. Terrill had conversations with Major Nealey and Major Strobel. The conversation with Major Nealey occurred around May 7, 1982, when Mr. Terrill, who at the time was aware that discipline for his April 22, 1982, letter was under consideration,

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requested under the Privacy Act all records related to the matter of the April 22, 1982 letter. During the conversation Major Nealey informed Mr. Terrill that he was of the opinion that Respondent had three options it could utilize with respect to the discipline to be accorded Mr. Terrill for his April 22, 1982 letter, which he, Major Nealey, considered to be a violation of OPNAVINST 1200014, Chapter 18, CBI 752, Department of Navy Adverse Actions. The three options were deportation, dismissal from the Civil Service or some lesser adverse action. Major Nealey further informed Mr. Terrill that he was of the opinion that the April 22, 1982 letter had not been sent by Mr. Terrill as president of the Union but rather as an individual.4/

The conversations with Major Strobel occurred on May 28, 1982 and June 7, 1982. During the above conversations Major Strobel told Mr. Terrill that he did not believe that Mr. Terrill was acting on behalf of the Union when he wrote the April 22, 1982 letter which in Major Strobel's opinion was not only malicious but a violation of SECNAV Instruction 5370.2G, paragraph 5(b)(3)(6).

> SECNAV Instruction 5370.2G reads in pertinent part as follows:
>
> 5 General policies governing the conduct of naval personnel.
>
> (b) Conduct prejudicial to the Government. Naval personnel shall avoid any action, whether or not specifically prohibited by this instruction, which might result in or reasonably be expected to create the appearance of:
>
> (3) Impeding Government efficiency or economy.
>
> (6) Adversely affecting the confidence of the public in the integrity of the Government.

4/ On direct examination Major Nealey in answer to a question from Respondent's Counsel stated he was of the opinion that Mr. Terrill's action constituted a violation of the Status of Forces Agreement which prohibits participation of civilian employees in any political activity in the Republic of Korea. In this connection, it should be noted, however, that reprimand to Mr. Terrill, which was the decision of Major Strobel, was based solely on a violation of Navy regulations and that Major Strobel testified that he was not "well versed" in the Status of Forces Agreement.

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According to Mr. Terrill the letter was written to the Korean Paper in hopes that it would be picked up by some American Papers since the matters touched on i.e. demand by Christian leader for the recall of General Wickham, were of interest in the United States as well as Korea. Mr. Terrill was in hopes that if the story was in fact picked up by the United States papers, the Union would be able to get some publicity with respect to some of labor relations problems existing in Korea between Respondent and the Union. The mention of the civilian employees being treated as second-class citizens referred to an alleged policy of Respondent in giving preference to the military personnel over civilian personnel with respect to family housing on the base and restricting the use by civilian employees of post office facilities to only certain hours. The reference to General Wickham displaying little regard to "basic American freedoms or for our country's labor laws" concerned the alleged policy of allowing the MP's to arrest civilian employees outside the base and the fact that the Union had filed some 77 unfair labor practice complaints under the Statute. The statement in the letter to the effect that the General had sought to destroy the Union was based upon Respondent's attempt to seek an Executive Order which would reduce certain bargaining obligations imposed upon the Respondent by the Statute and the fact that the Union believed that certain actions taken by the Respondent were motivated by a desire to rid itself of the Union. The characterization of the General's appointment to be Vice Chief of Staff of the Army as "a marvel of poor judgment" was for purposes pointing out the poor labor relations history the Union enjoyed under the General's current command and the fear that such history would continue if the General was given a new and higher position in the chain of command. The reference in the letter to the General having used his office for personal advantage in the area of ration control was predicated on the fact that military officers names had been deleted from computer programming which listed the names of ration control violators. In this latter respect, Major Nealey confirmed the fact that military officers were deleted from the computer program, but pointed out that the programming did make the names of military officer violators available to higher ranking general officers.

Discussion and Conclusions

Respondent urges dismissal of the instant complaint on the grounds: (1) Mr. Terrill's letter was personal and not union activity, (2) assuming the letter was union activity, it is unprotected since it was false and malicious and because it violated the Status of Forces Agreement which prohibits political activity by civilian employees, and (3) there exists an established appeals procedure which Mr. Terrill by virtue of Section 7116(d) of the Statute is obligated to follow.

The General Counsel urges a 7116(a)(1) and (2) finding on the ground that Mr. Terrill's letter was written not as an individual but as union president and that the content of the letter did not exceed the bounds of protected activity.

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Contrary to the contention of Respondent, I find that Mr. Terrill was indeed acting as union president and not an individual employee when he wrote the Arpil 22nd letter. Thus, the record establishes that the letter was written on Union stationery and signed by Mr. Terrill in his capacity as union president. Additionally both the testimony of Mr. Terrill and Mr. Rydzynski support such conclusion and indicate that Mr. Terrill has the authority to write on behalf of the Union without first seeking approval of such actior from either his fellow officers or the Union's national office.

I further conclude, again contrary to the contention of the Respondent, that Section 7116(d) of the Statute does not preclude the processing of the instant unfair labor practice complaint. Only those appeals procedures which provide for third party review fall within the purview of Section 7116(d). Veterans Administration Regional Office, Denver, Colorado and AFGE, AFL-CIO, Local 1557, 7 FLRA No. 100. Accordingly, inasmuch as the sketchy record evidence indicates that review of Mr. Terrill's reprimand will be in the hands of a superior officer in the chain of command and not a disinterested third party, I find that Section 7116(d) is not a bar to the instant proceeding.

Having concluded that Mr. Terrill was acting in his capacity as union president when he wrote the April 22nd letter and that the instant proceeding is not barred by Section 7116(d) of the Statute, the sole issues remaining for consideration are whether appeals to the public constitute protected activity, and if so, was the April 22nd letter of Mr. Terrill so defamatory that it lost the protection of the Statute.

With respect to the first question, the Authority in Veterans Administration, Veterans Administration Medical Center, Shreveport, Louisiana, 5 FLRA No. 27, found a 7116(a)(1) and (2) violation predicated upon an Agency's action in reprimanding the Chief Union Steward because of her action in contacting a TV reporter concerning a labor relations dispute at the Agency's installation. Accordingly, based upon the Authority's decision in Veterans Administration Medical Center, supra, I find that contacting newspapers for the purpose of publicizing labor disputes is activity protected by the Statute.

The second question, i.e. was the April 22nd letter so defamatory that it lost the protection of the Statute does not lend itself to an easy resolution.

Although the Authority has not had the opportunity to consider publications similar to that under consideration herein, the Supreme Court, various Circuit Courts of Appeals and the National Labor Relations Board have had such opportunities. Inasmuch as the Supreme Court in

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National Association of Letter Carriers v. Austin, 418 U.S. 264 made it clear "that the same federal policies favoring uninhibited robust and wide open debates" allowed under the NLRB are applicable in the federal sector it is clear that cases arising under the NLRB should be given precedential weight.

A review of the cases arising under the NLRB indicate that the Supreme Court, Circuit Courts and the NLRB have been extremely reluctant to restrict the employees freedom of speech in the labor relations arena and have found statements, leaflets or publications to be unprotected only when such statements or publications were disloyal to the employer's product or disruptive of discipline. NLRB v. Local 1229, 346 U.S. 464; Southwestern Bell Telephone Co. 200 NLRB 667. In the absence of a showing of disloyalty to the employer's product or of a possible disruption of discipline, the use of intemperate, abusive, and insulting language has been found to be an insufficient reason to remove a union's leaflet, statement or publication from the protection of the NLRB or the Statute. National Association of Letter Carriers, supra; NLRB v. New York University Medical Center, CA 2, No. 82-4137, 1/21/83, and the cases cited therein. Thus, as pointed out by the 2nd Circuit in New York University Medical Center, supra, the Supreme Court in National Association of Letter Carriers made it clear that Federal Law gives a union a license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make a point; and erroneous assertions lose their protected status only when they are published with knowledge or their falsity or with reckless disregard of whether they be true or false.

Applying the above cited body of law to the contents of the April 22nd letter, I find that the statements or allegations contained therein while not disruptive of discipline were disloyal to the Respondent. Aside from the statement of opinion that the selection of General Wickham to be Vice Chief of Staff was "a marvel of poor judgment" and advocating the recall of the General, the letter related to a number of continuing and on going labor relations policies of the Respondent which the Union was unhappy with.

As Mr. Terrill's record testimony indicates, the accusations were based upon the Union's views and perspectives of certain actions which had been taken by the Respondent. The fact that Respondent or an independent third party might reach different conclusions with respect to the actions of the Respondent does not remove the Union's statements thereon from the protection of the Statute. It is only those statements which are knowingly false and uttered with reckless abandon which lose the protection of the Statute. Here, however, each statement or allegation of Mr. Terrill, in his position as union president, was shown to be related to a past action taken by Respondent. While his views of, and statements about, such actions might have been incorrect, they did

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not rise to the ilk of being knowingly false slanderous statements, recklessly uttered. Viewing Mr. Terrill's record testimony concerning the basis for his allegations in the April 22nd letter against Major Nealey's denials and explanation of the reasons for Respondent's actions in the various situations, I conclude, that at best, Mr. Terrill's allegations concerning General Wickham's actions in the field of labor relations were exaggerations of existing facts. Being of such a nature, they were not removed from the protection of the Statute.

The above conclusions aside, I am not persuaded that under all the circumstances present herein, Mr. Terrill's actions fall within the protection of the Statute. Mr. Terrill, in order to publicize the Union's legitimate labor relations problems, interjected the Union into a highly charged political dispute between the Christian leaders and the Korean government, selected a Korean newspaper as a vehicle, and then advocated the recall of the commanding general and criticized his appointment as Vice Chief of Staff of the Army. By taking such action, Mr. Terrill made common cause with the Christian leaders and engaged in conduct prejudicial to the Government of the United States.

All comments or actions by union officers which are related to labor relations do not fall within the protection of the Statute. To the extent that a union officer includes in his statements or publications about existing labor relations problems derogatory and/or defamatory remarks which undermine the credibility and the confidence of U.S. government officials in a foreign country and which have no reasonable nexus to his union's legitimate labor relations problems, such union agent loses the protection of the Statute.

My decision herein should not be interpreted as a finding that the right accorded to unions by the Statute, i.e., to publicize labor relations problems and seek outside support and assistance, ceases to exist by virtue of the fact that it is exercised on foreign soil. However, I do find that the exercise of such right must be tempered by the possible repercussions its exercise might have on the political situation then existing between the United States and the host nation. Similarly, I recognize that embarassment of the management officers involved is generally an incidental by-product of all publications concerning labor relations disputes. Here, however, the embarassment flowing to the General, the senior U.S. military representative in Korea, is more than an incidental by-product of Mr. Terrill's publication.

Accordingly, based on the foregoing conclusions, I find that Mr. Terrill's actions exceeded the bounds of protected activity and I recommend that the Authority adopt the following order dismissing the complaint in its entirety.

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ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 8-CA-20391, should be, and hereby is, dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: February 17, 1983
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE

Respondent

and

Case No. 3-CA-20156

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practice alleged in the complaint and recommending that it be ordered to cease and desist therefrom and to take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and a supporting brief, and the Charging Party filed an opposition to the Respondent's exceptions. Each of the following organizations filed an amicus curiae brief: The Office of Personnel Management (OPM); the Department of Agriculture (DA); the Department of Health and Human Services (HHS); the Department of the Interior (DOI); and the Department of Energy (DOE).1/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record in this case, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate concerning proposals submitted by the Charging Party during the term of existing collective bargaining agreements which were not related to any changes initiated by the Respondent. The Judge found that the Respondent violated the Statute as alleged in the complaint, concluding that the duty to bargain in good faith imposed upon agencies by the Statute includes the requirement to

1/ These agencies were granted permission to participate in this proceeding pursuant to section 2429.9 of the Authority's Rules and Regulations.

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bargain over proposals initiated by a union during the term of an existing collective bargaining agreement concerning subjects not specifically waived by the union during negotiations or included in the existing agreement. The Judge supported this latter conclusion by relying upon precedent under the National Labor Relations Act, most especially the case of Jacobs Manufacturing Company, 94 NLRB 1214 (1951), enf'd, 196 F.2d 680 (2d Cir. 1952). The Authority does not agree.

The issue here presented is whether there exists an obligation under the Statute to bargain over proposals initiated by a union during the term of an agreement which are unrelated to management-initiated changes in conditions of employment. The findings and purpose of the Statute are set forth in section 7101.2/ In that section, Congress stated that the statutory protection of the right of employees to bargain collectively safeguards the public interest, contributes to the

2/ Section 7101 provides in relevant part as follows:

§ 7101. Findings and purpose

(a) The Congress finds that--

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

. . . . . .

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

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effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment. Congress therefore concluded that collective bargaining in the civil service is in the public interest.3/ At the same time, Congress also noted in that section that the provisions of the Statute should be interpreted in a manner which is consistent with the requirement of an effective and efficient Federal Government. In order to understand the extent of the right to bargain collectively in the context of the requirement of an effective and efficient Government, it will be necessary to address the meaning of collective bargaining and the rights and obligations associated therewith.

Collective bargaining is defined in section 7103(a)(12) of the Statute as follows:

§ 7103. Definitions; application

(a) For the purpose of this chapter--

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

The rights and obligations of parties to engage in collective bargaining under the Statute are set forth in section 7114. Of significance here are the following provisions of this section:

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the

3/ See, in this connection, Department of Defense v. Federal Labor Relations Authority, 685 F.2d 641, 644 (D.C. Cir. 1982) and Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority, 659 F.2d 1140, 1145 (D.C. Cir. 1981).

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unit it represents and is entitled to act for, and negotiate collective bargaining agreements. . . . [Emphasis added.]

. . . . .

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. . . . [Emphasis added.]

. . . . . .

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement; [Emphasis added.]

. . . . . .

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

It is apparent from the specific language of these provisions of the Statute that a labor organization which is an exclusive representative of employees in an appropriate unit and the agency in which the employees are employed have a mutual obligation to negotiate in good faith in an effort to reach a collective bargaining agreement with respect to conditions of employment affecting employees in the unit. When these provisions of the Statute are read in conjunction with the Statute's findings and purpose as set forth in section 7101, it is clear that a goal of collective bargaining is to facilitate and encourage the amicable settlement of disputes between employees and their employer concerning conditions of employment and that this can best be achieved by the negotiation of collective bargaining agreements as appropriate under applicable law. Thus, stability at the work place with respect to employees' conditions of employment can be attained by the fulfillment of the mutual obligation of the parties to bargain in good faith in an effort to reach a collective bargaining agreement. Moreover, to the extent that the parties are required to adhere to the specific conditions of employment mutually established in their agreement during the life of such agreement, stability at the work place is thereby fostered.4/ While Congress found collective bargaining in the public

4/ See, e.g., Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington, 14 FLRA 644 (1984), in which the Authority

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interest, in so doing, Congress further expressed an intent to limit the bargaining obligation over union-initiated proposals to situations where parties are negotiating a basic collective bargaining agreement. In this regard, the Senate Committee on Governmental Affairs, in explaining section 7215(a)(1)5/ of the Bill (S. 2640), which is substantially identical to the language contained in section 7114(a)(1) of the Statute, supra, stated as follows:6/

> The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement. [Emphasis added.]

Thus, by this statement, Congress intended that where parties are negotiating a basic collective bargaining agreement, the bargaining obligation shall exist with respect to negotiable proposals initiated by either agency management or the exclusive repesentative. However, outside this context, Congress intended the bargaining obligation to exist only with respect to changes in established conditions of

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determined in part that where parties have elected to negotiate over "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to bargain under section 7106(b)(1) of the Statute or those matters which are outside the required scope of bargaining under the Statute, stability in Federal labor-management relations can be achieved by requiring the parties to adhere to those terms during the life of the agreement.

5/ Section 7215(a)(1) of the Senate Bill provided:

> § 7215 Representation rights and duties
>
> (a) If a labor organization has been accorded exclusive recognition, such organization shall be--
>
> (1) the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees in the unit.

6/ S. Rep. No. 95-969, 95th Cong. 2d Sess. 40 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 764 (1979).

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employment proposed by management.7/ This distinction indicates that other than negotiations leading to a basic collective bargaining agreement, there is no obligation to bargain over union-initiated proposals.

Moreover, as previously noted, various provisions of the Statute emphasize the importance of negotiating collective bargaining agreements for the purpose of facilitating and encouraging the amicable settlement of disputes concerning conditions of employment in an effort generally to promote stability at the work place. Were the Authority to now hold that there is a statutory obligation for agency management to bargain at any time during the life of a collective bargaining agreement over union-initiated proposals which are unrelated to changes initiated by agency management, the ability of the parties to rely upon such basic agreements as a stable foundation for their day-to-day relations would be diminished. Parties would be discouraged from engaging in the effort, as part of negotiation of their basic collective bargaining agreement, to foresee potential labor-management relations issues, and resolve those issues in as comprehensive a manner as practicable. Instead, such a holding would encourage dispersal of the collective

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7/ The Senate Report as cited at note 6, supra, also stated: "[w]here agency management proposes to change established personnel policies, the exclusive representative mut be given notice of the proposed changes and an opportunity to negotiate over such proposals to the extent they are negotiable" (emphasis added). This statement is consistent with the precedent under the Statute's predecessor, Executive Order 11491, as amended. In this regard, case law under the Executive Order "... require[d] adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised [were] controlled by current contractual commitments, or a clear and unmistakable waiver [was] present." See the 1975 Report and Recommendations of the Federal Labor Relations Council [to the President] on the Amendment of Executive Order 11491, as Amended, Labor-Management Relations in the Federal Service (1975), at 41. Moreover, it had never been established under the Executive Order that there was any obligation to bargain over union initiated mid-term proposals. Rather, in Army and Air Force Exchange Service, Capitol Exchange Region Headquarters, Case No. 22-6657(CA), 2 Rulings on Request for Review 561 (1976), the Assistant Secretary of Labor for Labor-Management Relations adopted the dismissal of a complaint which alleged that agency management had violated its duty to bargain in good faith by refusing to negotiate concerning the union's mid-contract proposal that it be granted the use of an employee breakroom to conduct a union membership drive. The complaint had been dismissed below in part on the basis that the Executive Order "does not impose any mandatory obligation on an

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bargaining process. It is difficult to envision that Congress, with its interest in the achievement of effective and efficient Government through collective bargaining and the execution of collective bargaining agreements, intended to provide such a disincentive to bargaining for a contract and such an incentive to continuous bargaining on an issue-by-issue basis. Such an approach to bargaining would inject uncertainty into the parties' relationship, enhance the prospect for protracted conflict, and could lead to the continuous expenditure of resources for both management and exclusive representatives.

This is not to say, of course, that all bargaining would be precluded during the term of an agreement. Thus, for example, where management seeks to alter an established condition of employment in a manner which is not precluded by the agreement, it is obligated to notify the exclusive representative and afford the latter an opportunity to bargain either over the substance of the change to the extent that it may be within the scope of bargaining or its impact and implementation. See, e.g., Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA 229 (1982) and Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). Additionally, where parties have negotiated a reopener provision in their agreement, timely negotiable proposals submitted in connection and consistent therewith are subject to the mutual obligation to bargain. See generally, Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, 7 FLRA 610 (1982) and American Federation of Government Employees, AFL-CIO, Local 2494 and Strategic Weapons Facility Pacific, Bremerton, Washington, 7 FLRA 590 n.2 (1982). And, of course, management retains the authority to exercise its rights under section 7106(a) of the Statute subject to bargaining with the exclusive representative under section 7106(b)(2) and (3). See Social Security Administration, 8 FLRA 517 (1982).

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Activity to bargain over changes proposed or requested by the Union during the term of the contract and does not give the exclusive representative any right to demand such bargaining." (Id. at 562) In adopting the dismissal, the Assistant Secretary noted among other things that "the parties' negotiated agreement provides for union membership drives, although the use of agency facilities for such purposes is not specifically outlined therein." Accordingly, an obligation to negotiate union initiated mid-term bargaining proposals did not exist under the Executive Order. The legislative history of the Statute evinces an intent on the part of Congress to continue this policy.

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Turning to the instant case, the record indicates that the parties entered into collective bargaining agreements covering the two units involved herein on January 26, 1981. On July 29, 1981, six months later, the Charging Party submitted its bargaining proposals and demanded negotiations. Based on the above, the Authority concludes that there was no obligation to bargain over these union-initiated proposals and that the Respondent's failure to do so does not constitute a violation of section 7116(a)(1) and (5) of the Statute, as alleged. Accordingly, the Authority shall order that the complaint be dismissed in its entirety.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-20156 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 24, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

INTERNAL REVENUE SERVICE Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No.: 3-CA-20156

Richard J. Mihelcic, Esquire
Edward Lee Patton, Esquire
For the Respondent

Patricia Eanet Dratch, Esquire
For the General Counsel

Mr. Thomas Spangler
Joseph V. Kaplan, Esquire
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder, Fed. Reg., Vol. 45, No. 12, January 17, 1980 and Vol. 46, No. 154, August 11, 1981, 5 C.F.R. Chapter XIV, Part 2411, et seq.

Pursuant to a charge filed on November 27, 1981, by the National Treasury Employees Union (hereinafter called the Union or NTEU), a Complaint and Notice of Hearing was issued on February 26, 1982, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the Internal Revenue Service (hereinafter called the Respondent or IRS), violated Sections 7116(a)(1)

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and (5) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute or Act), by virtue of its actions in refusing to negotiate over mid-term proposals submitted by the Union which were not related to any changes in personnel policies or practices, or general conditions of employment initiated by Respondent.

A hearing was held in the captioned matter on April 15, 1982, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The parties submitted post hearing briefs on May 17, 1982, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union, the charging party herein, is the exclusive representative of various units of employees working for the IRS in its National Office, regions, districts, service centers, Detroit Data Center and National Computer Center.

The Union and the IRS are parties to two separate collective bargaining agreements covering the aforementioned IRS employees who are represented by the Union. The NORD agreement applies to the employees working in the National Office, regions and districts. The Service Center Agreement is applicable to the IRS service centers, Detroit Data Center and the National Computer Center. Both agreements were effective January 26, 1981.

Article 39, Section C of the NORD Agreement and Article 38, Section C of the Service Center Agreement set forth the ground rules for mid-contract negotiations of "Employer" sponsored "proposed changes in the conditions of bargaining unit employees employment". Neither contract contains any provision for Union sponsored changes in conditions of employment, nor do they make any reference, whatsoever, to mid-term proposals of the Union with respect to subjects not encompassed in such collective bargaining agreements. In this latter context, Mr. Irvin Des Roches, the Chief negotiator for the IRS since 1969, in the matter of collective bargaining agreements, testified that the parties always had the understanding while they were negotiating the NORD and Service Center Agreements and the parties similar predecessor agreements that they were negotiating for the life of such agreements "except for changes". In support of his position, Mr. Des Roches relied upon Article 39 and Article 38, respectively of the NORD and Service Center Agreements. Mr. Des Roches further acknowledged that he had been unsuccessful on behalf of the

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IRS in obtaining "a written waiver from the Union that gave up any and all rights during the life of the [collective bargaining] agreement". In this latter connection, Mr. Frank Ferris, Director of Negotiations for NTEU since 1979, who admittedly was not at all the negotiating sessions leading up to the current NORD and Service Center Agreements, denied that the Union had ever waived its right to "enter into bargaining during the term of the agreement".

On July 29, 1981, the Union sent a letter to the Respondent wherein it requested negotiations on nine proprosals dealing with conditions of employment. The nine proposals dealt with Government Cars, Employee Investigations, Legislative Salary Check Off, Professional Difference of Opinion, Fitness For Duty, Work at Home, Emergency Suspensions, Administrative Holidays, and Geographic Selection of Work Site.[1/]

The Union's proposals contained in the July 29, 1981, letter to Respondent read in pertinent part as follows:

GOVERNMENT CARS

The Employer will make available to any union official who is to be engaged in the use of official time a government car as long as a government car is already in use at the employee's posts-of-duty for other official matters.

EMPLOYEE INVESTIGATIONS

In no case will any employee who is the subject of an investigation by management (including Inspection) that could reasonably lead to discipline be required to answer any question put to him or her. No adverse consequences of any kind e.g., supervisory harrassment, will befall the employee for his/her refusal to answer.

LEGISLATIVE SALARY CHECK OFF

During the first full pay period in April and October of each year an employee may have deducted from his/her salary an amount of money designated by the employee. This money will be sent by IRS to NTEU no later than the end of the next full pay period.

[1/] Although the charge originally relied upon Respondent's refusal to negotiate over the nine proposals, during the course of the hearing the General Counsel made it clear that for reasons not set forth in the record, it was withdrawing any allegations of the Complaint predicated on the proposals dealing with Emergency Suspensions, Administrative Holidays and Professional Difference of Opinion.

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FITNESS FOR DUTY

In no case will an employee be forced to be physically or mentally examined in a "fitness for duty" examination by the government chosen doctor unless he/she so chooses.

If the employee does not want to use a government designated doctor he/she need only submit a list of three doctors from which the employer will choose the doctor to do the examination.

WORK AT HOME

Because of the benefits that can flow from employees working at their homes, the employer will immediately begin a one year experiment to test the feasibility of the premise.

The test will include Revenue Agents, Revenue Officers, Tax Auditors, Revenue Representatives, and others in like positions.

The employees will be permitted to do work at home that would otherwise be done in the office, but without public contact.

At the completion of the test either party can reopen negotiations on this subject.

GEOGRAPHIC SELECTION OF WORK SITES

Effective and enlightened personnel management practices call for permitting employees to choose when they will do their assigned duties. Consequently, the parties agree to give employees more freedom on this matter by implementing the following:

> When opportunities arise which call for employees to temporarily perform their assigned duties outside their normal duty station, e.g., at a taxpayer's place of business, these temporary assignments will be offered to qualified and available employees with requisite skills on the basis of seniority. If there are no volunteers these assignments will be rotated among qualified and available employees with requisite skills in inverse order of seniority. These procedures are limited to situations which would not require a position change of an employee, and they do not require an assignment in the absence of work.

By letter dated September 23, 1981, Respondent acknowledged the Union's letter and noted that inasmuch as no changes had been effected in the areas of the proposals, the Respondent was under no obligation "to negotiate over the Union's proposals at this time". Respondent further informed the Union that "the proposals could be the subject of discussions

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when the NORD and Center Agreements may be renegotiated in 1985, or, of course, if the Service actually does make a change on these issues before then".

By letter dated October 8, 1981, the Union acknowledged receipt of Respondent's September 23, 1981 letter, and informed the Respondent that it, the Union, had a right, independent of changes, to request bargaining at any reasonable time as may be necessary.

On November 12, 1981, the Respondent sent a letter to the Union wherein it stated in pertinent part as follows:

> ....it is the Services' position that we have no obligation to negotiate over mid-term proposals initiated by NTEU that do not directly relate to management initiated changes in personnel policies or practices, or general conditions of employment. Since the proposals submitted on July 29, 1981, do not relate to any management initiated changes, we are under no obligation to negotiate over them.

The record further indicates that during the negotiations leading up to the current collective bargaining agreements, the Union submitted proposals dealing with (1) allowing Field Revenue Officers and Revenue Agents to spend one duty hour per day at home to prepare reports and make telephone calls, (2) the right of employees to have representatives at inspection interviews which the employee reasonably believes may result in disciplinary action,[2/] (3) allowing Union Stewards, Chapter Presidents or grievants to receive necessary administrative time, travel and per diem in connection with grievances, formal discussions, etc., and (4) payment for medical certificates and physicals in connection with fitness for duty examinations.

Mr. Irvin Des Roches, the Chief Negotiator for the IRS, and Respondent's sole witness, testified that while union check-offs and terminations were discussed during the negotiations there were no discussions or negotiations concerning legislative checkoffs.

Other than indicating that the Union had submitted the proposals set forth above during the negotiations, Mr. Des Roches did not go into any detail concerning what transpired with respect to such proposals during the negotiations, nor did he give any reasons for the non-inclusion of the Union's proposals in the current NORD and Service Center Agreements.

2/ The Union's five-page proposal also contained language allowing the employee to remain silent at the inspection interview, but made the employee subject to removal if the employee failed to answer material and relevant questions pertaining to performance of his job duties.

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With respect to the Union's proposal concerning the use of Government Cars, Mr. Des Roches acknowledged that the subject was not specifically broached during the negotiations dealing with per diem pay, etc. to union stewards.

Both Mr. Frank Ferris, Director of Negotiations for the NTEU, who attended many of the pre-contract negotiations, and Mr. Des Roches acknowledged that physical examinations were only discussed in connection with such examinations for pregnant employees.

As to the proposal dealing with Geographic Selection of Work Sites, Mr. Des Roches testified that such subject was only discussed in connection with the negotiations concerning employees working at home.

Article 17, Section 2 and Article 40 of the NORD Agreement, and Article 16, Section 2 and Article 39 of the Service Center Agreement contain provisions dealing with dues check-off and maternity leave examinations in connection with fitness for duty. The maternity leave provision makes no mention of the employee's right to select her own doctor, and the check-off provision is limited to union dues.

Discussion and Conclusions

Respondent takes the position that, in the absence of employer initiated changes, it is under no obligation to bargain over mid-term proposals concerning working conditions, etc., submitted by the Union. In the alternative, Respondent takes the position that it is under no obligation to bargain over any subjects which were discussed, or could have been discussed, during the contract negotiations leading up to the NORD and Service Center Agreements.

The General Counsel and the Union, on the other hand, take the position that the Respondent is obligated to bargain over the mid-term proposals submitted by the Union and that the Union did not waive its rights to bargain over the six mid-term proposals during the negotiations leading up to the current collective bargaining agreements.

In support of its position with respect to mid-term bargaining, the Union and the General Counsel rely for the most part on two Circuit Court decisions in the private sector, i.e., Jacobs Manufacturing v. NLRB, 196 F.2d 680 and NL Industries v. NLRB 536, F.2d 786, wherein the Courts concluded that in the absence of a waiver, an employer has the duty and obligation to bargain with respect to subjects which were neither discussed nor embodied in any of the terms of an existing collective bargaining contract. With regard to the waiver issue, the General Counsel and the Union take the position that the record falls short of establishing that the six mid-term proposals were fully discussed during pre-contract negotiations to the extent that the Union consciously and unequivocally waived its right to future bargaining on such subjects.

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Respondent acknowledges the private sector law but takes the position that a different conclusion should be reached in the public sector since the industrial strife occasioned by strikes and lockouts which mid-term bargaining is designed to prevent, is not present in the public sector. In this context, while it is true that the Court in Jacobs Manufacturing, supra, did allude to the fact that the absence of mid-term bargaining in the private sector might lead to industrial strife occasioned by strikes and lockouts, it did not base its decision with respect to the necessity for mid-term bargaining solely on that factor. The main issue before the court in Jacobs, supra, was the impact of Section 8(d)[3/] on mid-term bargaining. As noted above, the Court, citing the precise language of the Statute, concluded that an employer was obligated to enter mid-term bargaining with respect to proposals encompassing terms and conditions of employment which were neither discussed nor encompassed in the collective bargaining agreement.

Neither a review of the legislative history nor a literal reading of the Federal Services Labor-Management Relations Statute compels a different conclusion with respect to mid-term bargaining than that currently existing in the private sector. Moreover, to hold otherwise, would give a distinct advantage to agencies, since only they would be free to initiate mid-term changes in conditions of employment. Giving such an advantage to employers would run counter to the intent of Congress which sought to put agencies and unions on an equal footing in the matter of collective bargaining. To insure such equal footing, Congress went so far as to authorize payment of travel and per diem expenses as well as utilization of official time for employees representing exclusive representatives in both basic and mid-term collective bargaining. See, Interpretation and Guidance, 2 FLRA No. 31; Bureau of Alcohol, Tobacco and Firearms, Western Region, Dept. of Treasury, San Francisco, U.S. Ct of Appeals, (9th circuit), BNA, Govt. Employees Relations Reporter, No. 958, April 12, 1982, pg. 37.

Further, contrary to the position of the Respondent, I do not believe that the full scope grievance procedure mandated by the Statute provides an effective substitute for mid-term bargaining. Such grievance procedures are generally only applicable to interpretation and enforcement of existing terms and conditions of employment and make no provision for proposals dealing with the institution of new terms or conditions of employment.

[3/] Section 8(d) of the Taft Hartley Act, provided in pertinent part that the duty to bargain collectively ". . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period. . . ."

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Finally, with respect to Respondent's position concerning the absence of an obligation to bargain over a union's mid-term bargaining proposal, I do not agree that the Assistant Secretary's decision in Army and Air Force Exchange Region Headquarters, Case No. 22-6657(CA), Ruling on Requests for Review, Case No. 779, holds that there is no mandatory obligation on an activity to bargain over a union's mid-term bargaining proposals. While it is true that the Acting Regional Administrator did make such a statement in his letter dismissing the Complaint, the Assistant Secretary, however, affirmed the Acting Regional Administrator's dismissal on the sole ground that the agency had indeed bargained on the mid-term proposal.

Having concluded that the Respondent is obligated to bargain over mid-term bargaining proposals submitted by a union, the sole question remaining for resolution is whether the Union in the instant case waived its rights during the negotiations leading up to the current NORD and Service Center Agreements to bargain over the six mid-term proposals submitted on July 29, 1981.

It is well established that a waiver will be found only if it can be shown that the exclusive representative clearly and unmistakably waived its statutory right to negotiate on the proposals in dispute. Department of the Air Force, U.S. Air Force Academy & AFGE, AFL-CIO, Local 1867, 6 FLRA No. 100; Department of the Air Force, Scott Air Force Base, Illinois & NAGE, Local R7-23, 5 FLRA No. 2. The withdrawal of a contract proposal or failure to pursue a demand in contract negotiations does not constitute a waiver. IRS, Jacksonville, Florida Service Center, 1 FLRA No. 35; IRS Fresno Service Center, A/SLMR No. 1119; NASA, Kennedy Space Center, Florida, A/SLMR No. 223; Beacon Journal Publishing Co., 164 NLRB 734; The Press Co., Inc., 121 NLRB 976, 178.

Applying the above established principles of law to the record evidence herein, I cannot find that the Union expressly waived its rights with respect to mid-term bargaining on the six proposals under consideration herein. Thus, I find, contrary to the testimony of Mr. Des Roches, that Article 39 and Article 38, of the NORD and Service Center Agreements, respectively, are not what are generally referred to as "zipper clauses", wherein a union relinquishes all rights to bargaining on all subjects for the term of the agreement. This conclusion is supported by Mr. Des Roches' admission that he had been unsuccessful in obtaining "a written waiver from the Union that gave up any and all rights during the life of the [collective bargaining] agreement".

Accordingly, if the Respondent is to succeed in its waiver argument, it must be established that the six proposals were fully discussed during the negotiations leading up to the NORD and Service Center Agreements and that the Union consciously and unequivocally waived its rights to future bargaining thereon. Contrary to the contention of the Respondent, I can not find that the record supports such a conclusion.

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The record falls short of establishing that parties did in fact discuss the Union's proposals dealing with Government Cars, Legislative Salary Check Off, Fitness for Duty, Work at Home, Geographic Selection of Work Sites and the employee's right to remain silent at all interviews or investigations that could lead to discipline. In fact, Mr. Des Roches acknowledged that there were no discussions concerning legislative check-off or the use of government cars. Similarly, Mr. Des Roches' testimony with regard to the proposals dealing with Work at Home and Geographic Selection of Work Sites indicates that the only discussion of such subjects occurred with respect to the pre-contract proposal dealing with the right of certain employees to work one hour in the morning at their respective homes making telephone calls and preparing reports. Inasmuch as it is apparent that there is no relationship between the two proposals and the proposal discussed during the pre-contract negotiations, I can not conclude that such proposals were fully discussed and that the Union consciously and unequivocally waived its rights to future bargaining thereon.

With respect to the Union's proposals dealing with (1) the employees' right to remain silent during investigations, etc., which could lead to discipline and (2) fitness for duty examinations, the record reveals that such proposals were also not fully discussed during the negotiations leading up to the current NORD and Service Center Agreements. Thus, Mr. Des Roches acknowledged that the only discussions concerning fitness for duty involved maternity situations and not other situations where physicals would be required. Additionally, the existing contracts only refer to the payment for such physicals and not the selection of a doctor to perform such physicals.

Although Mr. Des Roches contended that the proposal dealing with silence during investigations was substantially the same as the Union's pre-contract proposal, a review of both documents indicates that the pre-contract proposal dealt solely with inspection investigations while the mid-term proposals dealt with all investigations and/or interviews which could lead to disciplinary action.

Accordingly, I find insufficient basis for concluding that the Union's mid-term proposals dealing with silence during investigations and fitness for duty were fully discussed during pre-contract negotiations and that the Union consciously and unequivocally waived its rights to future bargaining thereon during the term of the existing collective bargaining agreements.

Moreover, it is noted that the record, other than the testimony of Mr. Des Roches, which in the main merely identified the proposals submitted by the Union during the pre-contract negotiations and indicated that there had been some discussions thereon, is void of any evidence setting forth the details of any such discussions. In such circumstances, it is impossible to establish, as contended by the Respondent, that a waiver did

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occur. In fact, on the basis of the record evidence, the only thing that can be concluded, is that the Union submitted proposals which for some unexplained reasons were not included in the subsequent contracts.

As noted above, the withdrawal of a contract proposal or failure to pursue a demand in contract negotiations does not constitute a waiver. The vice in reaching a contrary conclusion is eloquently set forth by the NLRB in The Press Co. Inc., supra, wherein the Board stated as follows:

> To hold that, without regard to the nature of precontract negotiations, the mere discussion of a subject not specifically covered in the resulting contract removes the matter from the realm of collective bargaining during the contract term would be to place a premium (a) upon an employer's ability to avoid having the subject included in the contract, despite his knowledge of the union's position that it was a bargainable matter and not within his unilateral control; and (b) upon the union's ability to have the subject specifically referred to in the contract by engaging - if necessary - in a strike. Such a doctrine would inevitably result in increasing the area of potential conflict in the interests of the parties at the bargaining table. Thus, the union would feel constrained to refrain from raising questions on which it feared agreement might not be reached lest it be held to have bargained away its interest therein. However, unless the union was possessed of some special prescience, its estimate of the employer's position on certain important matters might well be erroneous and these would remain unresolved, possibly to plague the parties during the contract term. On the other hand, the employer would be encouraged to raise all conceivable issues and then to resist their inclusion in the contract, in order to retain the right of unilateral action; this, in turn, would require that, once a subject was mentioned, the union take an adamant position in insisting upon its inclusion. But many of the questions thus raised might otherwise never have been in issue if the parties were permitted to await the events giving rise to their importance. By encouraging the union to seek an inadequate agreement or requiring inclusion in the agreement of all these matters, many of which might be only of contingent significance at the time of negotiation, a needless impediment would be placed in the way of successful collective bargaining.

Upon the basis of the above analysis and conclusions I find that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by virtue of its actions in refusing to negotiate over the mid-term proposals submitted by the Union on July 29, 1981.

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Accordingly, I recommend that the Authority issue the following Order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Refusing to enter into mid-term bargaining negotiations with the National Treasury Employees Union as the exclusive representative of its employees in appropriate units.

(b) In any like or related manner, interfering with, restraining or coercing unit employees represented by the National Treasury Employees Union, in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain collectively with the National Treasury Employees Union with respect to its proposals concerning Government Cars, Employee Investigations, Legislative Salary Check-Off, Fitness for Duty, Work at Home and Geographic Selection of Work Sites, or other terms or conditions of employment that are not already referred to in, or covered by, the terms of an existing collective bargaining agreement.

(b) Post at its offices covered by the NORD and Service Center Agreements copies of the attached notice marked "Appendix", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Deputy Commissioner of the Internal Revenue Service and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Deputy Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: June 15, 1982
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to enter into mid-term bargaining negotiations with the National Treasury Employees Union as the exclusive representative of our employees in appropriate units.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce unit employees represented by the National Treasury Employees Union, in the exercise of their rights assured by the Statute.

WE WILL upon request, bargain collectively with the National Treasury Employees Union with respect to its proposals concerning Government Cars, Employee Investigations, Legislative Salary Check-Off, Fitness for Duty Examinations, Work at Home and Geographic Selection of Work Sites, or other terms or conditions of employment that are not already referred to in, or covered by, the terms of an existing collective bargaining agreement.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 3, whose address is: 1111 18th Street, N.W., Washington, D.C., 20036, and whose telephone number is: (202) 653-8452.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1770

Union

and

Case No. O-NG-863

DEPARTMENT OF THE ARMY,
HEADQUARTERS, XVIII AIRBORNE
CORPS AND FORT BRAGG,
FORT BRAGG, NORTH CAROLINA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of five Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

B. ARTICLE EIGHT, SECTION FIFTEEN

The Employer shall designate trained Federal Women's Program members who will be available to employees. Federal Women's Program members will be knowledgeable of the application of EEO Regulations and other related procedures. Candidates must meet the criteria established by the Office of the Federal Women's Program, OPM [Office of Personnel Management]. The Union may nominate individuals to serve as FWP members. The Union shall have representation and input in the activities of the Federal Women's Program membership and/or equal representation on established FWP Committees.

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Union Proposal 2

C. ARTICLE EIGHT, SECTION SIXTEEN

The Employer agrees to designate trained coordinators for the Hispanic program who will develop and provide special outreach for equal opportunity for Hispanic employees. Hispanic coordinators will be knowledgeable of the application of EEO Regulations and other related procedures. Candidates must meet the criteria established by the Office of the Hispanic Program, EEOC [Equal Employment Opportunity Commission]. The Union may nominate individuals to serve as Hispanic Program coordinators. The Union shall have representation and input in the activities of the Hispanic program, coordinators and/or equal representation on established Hispanic Committee(s).
[The underlined portions of these two proposals are in dispute.]

The Agency contends that the disputed parts of Union Proposals 1 and 2, by prescribing the qualifications criteria for coordinator positions, fall within the ambit of section 7106(b)(1) of the Statute in that they affect the types and grades of employees or positions assigned as program coordinators. The Union asserts that the proposals do not have the effect suggested by the Agency. That is, the proposals leave management with "full discretion to determine what a 'trained' individual means,"[1/] and there are no restrictions "which would operate to include or exclude particular individuals or groups in the employer's selection" of program coordinators.[2/] Moreover, the Union states, the proposals would not, contrary to the Agency's interpretation, prohibit appointment of interns or trainees to the positions.

The Union's position is unpersuasive in that it is at odds with the plain language of the proposals. The proposals require the designation of "trained" coordinators. While the proposals do not stipulate the specific courses that the coordinators must have completed, it is clear from the context that the training should have made the appointees "knowledgeable of the application of EEO Regulations and other related procedures." Further, the proposals would require that appointees meet certain specified criteria. In view of the language of the proposals, the Authority will not base its determination on the Union's explanation

1/ Union Reply Brief at 2.

2/ Id. at 3.

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of the proposals. American Federation of Government Employees, AFL-CIO, Local 2955 and National Guard Bureau, Office of the Adjutant General, Des Moines, Iowa, 5 FLRA 617 (1981). Consequently, the Authority concludes that Union Proposals 1 and 2 are to the same effect as the proposals which were before the Authority in National Federation of Federal Employees, Local 1332 and U.S. Army Materiel Development and Readiness Command (DARCOM), 3 FLRA 200 (1980) which sought to prescribe the training, experience, and qualification to be possessed by alcohol and drug abuse counselors. The proposals in that case were found to be determinative of the "types" of employees who could fill counselor positions and therefore were held to be negotiable only at management's election pursuant to section 7106(b)(1) of the Statute. Hence, based on Army Materiel Development and Readiness Command, and the reasons stated therein, Union Proposals 1 and 2 are not within the duty to bargain since the Agency has elected not to bargain over them.

Union Proposal 3

L. ARTICLE TWENTY SEVEN, SECTION SEVEN, ACTIONS BASED UPON INSTANCES OF DISCOURTESY TO THE PUBLIC

The Employer agrees that Unit employees will be protected against arbitrary and malicious assertions of discourtesy by members of the public through careful and judicious consideration of such assertions, to include a thorough investigation of facts surrounding individual instances prior to taking action to document the occurrence.

Employees will be entitled to review any written record or complaint concerning an asserted incident of discourtesy and may provide a written statement concerning any incident.

In cases where the employee disagrees with an instance of asserted discourtesy, he may file a grievance to correct the facts alleged.

The Employer agrees that any assertion(s) of discourtesy not made with specificity or within 24 hours of any event will not be a basis for action against an employee.

The Employer recognizes that, on occasion, members of the public may perceive an employee's legitimate exercise of duty responsibility as a personal affront.

In cases where the employee shows his actions to be taken under supervisory direction or based upon operating procedures, no action will be taken by the Employer.
[The underlined portion of the proposal is in dispute.]

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In explaining the intent of Union Proposal 3, the Union states that, in order to be a basis for disciplinary action against an employee, the employee must be advised of his or her alleged discourteous conduct within 24 hours of the time that management becomes aware of the event.3/ The Agency asserts that the explanation is not consistent with the text of the proposal, in that the 24 hour period prescribed by the proposal commences with occurrence of the event, not from the time the alleged discourtesy comes to management's attention. However, a choice between these two interpretations is not necessary in reaching a negotiability determination.

Under either interpretation, the effect of the disputed part of Union Proposal 3 is to establish a contractual "statute of limitations," which, if exceeded, would preclude the imposition of discipline for discourtesy. In this respect, the disputed part is to the same effect as Provision 2 in National Federation of Federal Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National Parks, U.S. Department of Interior, 17 FLRA No. 45 (1985) which set a 60 day time limit upon the initiation of investigations of incidents which may lead to disciplinary actions. The Authority noted that "in many situations investigations are the essential first step to disciplinary action and preventing the initiation of investigations, as would Provision 2 upon expiration of the prescribed period of time, effectively precludes the imposition of discipline." [Footnote omitted.] Thus, the Authority found the provision to be inconsistent with management's right to discipline employees, pursuant to section 7106(a)(2)(A) of the Statute, by, in certain circumstances, preventing the Agency from acting at all with respect to that right. In like manner, the disputed part of Union Proposal 3 would prevent the Agency from imposing discipline for discourtesy in certain circumstances.4/ Consequently, based on National Park Service and the reasons and case cited therein, the disputed part of Union Proposal 3 is also inconsistent with the management right to impose discipline and is outside the duty to bargain.

3/ Petition for Review at 2.

4/ In this connection, it is noted that 5 U.S.C. § 7503(a) specifically provides that employees may be disciplined for "discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other patterns of discourteous conduct."

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Union Proposal 4

O. ARTICLE FORTY SIX, SECTION FOUR

The Employer shall make an effort to protect employees against thefts or [sic] personal property at the work place. This will include providing lockers or other secure area(s) for employees to store personal items during working hours.

The Agency asserts that Union Proposal 4 is not materially different from the proposal which the Authority found to be outside the duty to bargain in American Federation of Government Employees, AFL-CIO, Local 1917 and U.S. Department of Justice, Immigration and Naturalization Service, New York City District Office, 4 FLRA 150 (1980).4/ The proposal in the cited case would have required management to provide secure storage areas for unit employees' private weapons, "which are neither required nor permitted to be used in the performance of such employees' official duties." Contrary to the Agency's position, however, the disputed proposal herein is distinguishable from the one cited by the Agency. Union Proposal 4 concerns items employees would normally be expected to bring with them to work, e.g., wallets, purses, and lunches. Indeed, some of the items may be necessary for the employees to reach their work locations, in that wallets or purses would contain drivers' licenses, money for transportation and purchase of food, and identification credentials. In this respect, Union Proposal 4 is more closely related to Union Proposal XVI in American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477, et al, and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) enforced sub nom. Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983) which required management to provide showers and lockers for certain employees. The Authority determined that the proposal was within the duty to bargain because it "would be merely incidental to the performance of the Agency's work and would be principally related to matters affecting the working conditions of these [employees]." Hence, based on Library of Congress, and the reasons stated therein, Union Proposal 4 is within the duty to bargain.5/

As to the Agency's additional argument that the proposal concerns the technology of performing work, within the meaning of section 7106(b)(1) of the Statute, to the extent that it is intended to require provision of security storage areas for official uniforms, it is noted that the

4/ Statement of Position at 6.

5/ In finding Union Proposal 4 to be within the duty to bargain, the Authority makes no judgment as to its merits.

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proposal itself does not address this matter. As the Union points out, since the proposal only concerns storage facilities for personal items, "[s]hould official uniforms for the employees constitute the technology of work and the employer choose to [prescribe] the maintenance of official uniforms in the lockers or other secure areas, it would be free to do so under the union's proposal."6/ The proposal, therefore does not concern the technology of performing work in the manner suggested by the Agency.

Union Proposal 5

R. ARTICLE FORTY SIX, SECTION FOURTEEN

Unit employees who are required to spend time traveling shall be compensated for such travel time as hours of work if:
(a) The employee is required to travel during working hours.
(b) The employee is required to drive a vehicle or perform other work while traveling.
(c) The employee is required to travel as a passenger on an one-day assignment away from his official duty station; or
(d) The employee is required to travel as a passenger on an overnight assignment away from his official duty station during hours on non-workdays that correspond to the employees' regular working hours.

Unit employees will only be scheduled for travel during their regular duty hours and/or duty days.7/
[The underscored portion of the proposal remains in dispute. Footnote added.]

In American Federation of Government Employees, AFL-CIO, Local 3424 and Federal Home Loan Bank Board, San Francisco, California, 14 FLRA 79 (1984) the Authority concluded that Union Proposal 1, therein, which required that the agency grant a maximum amount of duty time for traveling from an employee's temporary duty location to his or her residence in certain circumstances, interfered with the management right, pursuant to

6/ Union Reply Brief at 8.

7/ Based on an understanding between the parties appearing in the record, the Agency has withdrawn its objection to the first paragraph of Union Proposal 5. Accordingly the petition for review as to all but the underscored portion of the proposal is now moot.

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section 7106(a)(2)(B) of the Statute, to assign work by reducing the time frame in which work could be assigned. The Authority noted in that decision (n.1) that management is required to exercise its rights under section 7106(a)(2)(B) in a manner consistent with law. Citing the requirement in 5 U.S.C. § 6101(b)(2) that an agency arrange travel during the scheduled workweek "to the maximum extent practicable," the Authority determined that the proposal nonetheless interfered with the right to assign work because it "would require travel during the scheduled workweek even where not practicable." In like manner Union Proposal 5, herein, with its flat prohibition of travel outside regular hours and days of work, interferes with the Agency's right to assign work and, consequently, is outside the duty to bargain.

Accordingly pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review as it relates to Union Proposals 1, 2, 3 and 5 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 4.

Issued, Washington, D.C., April 24, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 561

Union

and

Case No. O-NG-728

DEPARTMENT OF THE ARMY,
U.S. ARMY CORPS OF
ENGINEERS, MOBILE, ALABAMA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of the following Union proposal.

Government-Furnished Subsistence and Quarters

Employees required to travel in locations where Government-furnished subsistence and quarters are available will be paid as provided by Joint Travel Regulations. Although use of Government quarters by Unit employees is not mandatory, nonutilization of available adequate Government quarters can result in forfeiture of the quarters portion of the per diem allowance. Adequate Government quarters shall be decent, safe and sanitary; comparable to rooms furnished by national chain hotels/motels priced within the allowance quarters portions of the prevailing per diem rate. Prior to requiring that a traveler stay in Government quarters, those quarters will be evaluated by the Employer against a mutually established set of criteria to determine adequacy. The Union will be provided a copy of the list of installations with adequate quarters and supporting data for purposes of negotiations thereon prior to adoption or changes of list. The Employer shall initiate development of this list within 6 months of effective date of this contract.

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Use of Government quarters will not be required until they are determined to be adequate. The list of adequate Government quarters shall be updated as needed based on feedback of using employees. No quarters shall be considered adequate unless confirmed reservations can be granted by the supplying facility. [Only those underlined portions of the Union's proposal are in dispute.]

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.1/ The Union's proposal concerns negotiated standards of adequacy for government quarters to be utilized by civilian employees for accommodation while on temporary duty. The Agency contends, among other things, that the proposal is inconsistent with Agency regulations for which a compelling need exists and, therefore, is not within the duty to bargain under section 7117(a)(2) of the Statute.2/ The Union, however, disputes the Agency's contention claiming that a conflict does not exist between its proposal and the Agency's regulations and that, in the event that a conflict does exists, there is no compelling need for the Agency's regulations.

1/ The Agency's request to dismiss the appeal because the proposal is not sufficiently specific and delimited to permit the Authority to issue a negotiability determination is denied. The specific language of the proposal permits the Authority to reach a determination as to whether the proposal is inconsistent with Federal law, rule or regulation and, thus, its negotiability under the Statute. See American Federation of Government Employees, AFL-CIO, Local 1395 and Social Security Administration, Great Lakes Program Center, Chicago, Illinois, 14 FLRA 408 (1984), and the case cited therein.

2/ Section 7117(a)(2) of the Statute provides:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

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The Agency claims a compelling need exists for provisions of the Department of Defense Civilian Personnel, Volume 2, Joint Travel Regulations (JTR),3/ and the Department of Defense Instruction 4165.47,

3/ The JTR provides in pertinent part as follows:

C1055 USE OF GOVERNMENT QUARTERS

1. GENERAL. Although an employee may not be required to utilize Government quarters, when adequate Government quarters are available but not used, the payment of the quarters portion of the per diem or actual expense allowances of any employee on temporary duty away from his designated post of duty may not be made except under the following conditions:

1. When the order issuing authority, either prior to or subsequent to the travel involved, issues a statement to the effect that the utilization of Government quarters at the temporary duty station or delay point would adversely affect the performance of the assigned mission (this exception is not applicable to personnel attending training courses at an installation of the Uniformed Services);

2. When the commanding officer (or designated representative) responsible for Government quarters at the temporary duty or delay point furnishes a statement to the effect that utilization of Government quarters was impracticable;

. . . . . .

2. EFFECT OF ABSENCE OF STATEMENT. In the absence of a statement issued under the provisions of subpart. I or unless the nonavailability of adequate Government quarters can be ascertained by reference to a publication issued by the Uniformed Service concerned, it shall be assumed that adequate Government quarters were available on any day for which the employee fails to submit an appropriate statement (see subpars. 3 and 4) indicating that such quarters were not available or not utilized on that date. . . .

3. COMMANDING OFFICER'S STATEMENT. If the length of temporary duty or delay is for a period of 24 hours or more . . . , a statement by the commanding officer . . . ,

(Continued)

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Adequacy, Assignment, Utilization, and Inventory of Unaccompanied Personnel Housing (DoD Instruction).4/ The relevant provisions of

(Continued)

> is required . . . , as to the nonavailability of adequate Government quarters. Such a statement is not required under the conditions outlined in subpar. I or in any case where the nonavailability of adequate Government quarters can be ascertained by reference to a publication issued by the Uniformed Service concerned.
>
> . . . . . .
>
> Appendix D. Glossary of Terms
>
> GOVERNMENT QUARTERS. Sleeping accommodations in a facility (other than a mode of transportation) operated under United States Government control or supervision; or furnished by a foreign government under agreement or on a complimentary basis. . . . Government quarters include guest houses, officers clubs, operation hotels, bachelor officers quarters, visiting officers quarters, or similar quarters facilities located at a military activity; . . . Standards of adequacy are prescribed by Office, Secretary of Defense, and implemented by appropriate regulations of the Service concerned. [Emphasis added.]

4/ DoD Instruction 4165.47 provides in pertinent part as follows:

> D. POLICY AND PROCEDURES
>
> 1. General
>
> . . . . . .
>
> b. The minimum standards of adequacy shall apply worldwide, except for shipboard or field duty and for specific foreign areas, as determined by the Head of the Component concerned. . . .
>
> . . . . . .
>
> D.2 Minimum Standards of Adequacy
>
> . . . . . .

(Continued)

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the JTR state that while an employee is not required to utilize government quarters, when "adequate" government quarters are not used by an employee on temporary duty, the quarters portion of the per diem will not be paid in the absence of a statement of nonavailability or nonutilization. The JTR also provides that the standards to determine the adequacy of government quarters will be prescribed by the Office of the Secretary of

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(Continued)

e. Furnishings. Criteria and allowances for furnishings shall be as specified in DoD Instruction 4165.43 (reference (i)). However, the following basic items are required in all room-configured units for unaccompanied transient personnel: bed, bed linens, pillow, blanket, chair, closet or wardrobe, dresser or chest of drawers for each person, window coverings, lock and keys for doors to all rooms, and inside and outside locks or latches on all bathroom or kitchen facilities between rooms.

f. Services and Supplies. The following services and supplies are required in all room-configured units used for unaccompanied transient personnel:

1. Twenty-four hour check-in or check out service and 24 hour wake-up service, or issue of an alarm clock;
2. Custodial service in all common-use areas;
3. Daily maid service, which includes bed-making, cleaning of bathroom, emptying of trash containers and ashtrays, dusting and vacuuming, change of towel, washcloth, and drinking glass;
4. Change of bed linens when guests have departed, and at least weekly for long-term guests; and,
5. At least one towel, washcloth, bar of soap, and drinking glass per person.

g. Application. The minimum standards of adequacy for the existing inventory are contained in enclosures 3 and 4 for permanent party and transient personnel. The latter, together with the requirements specified in subparagraphs D.2.e and f., above, shall be used for determining when certification of nonavailability may be issued to personnel on TDY. [Emphasis added.]

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Defense (OSD). These standards are prescribed in DoD Instruction 4165.47, in question herein, and are the basis upon which a determination is made as to whether certificates of nonavailability should be issued.

The record indicates that these Agency regulations were promulgated in response to section 853 of the Department of Defense Appropriation Act of 1978 (Appropriation Act),5/ which prohibited the disbursement of funds for lodging for employees while on temporary duty when "adequate government quarters" are available but not occupied. Congress incorporated section 853 within the Appropriation Act in order to ensure significant savings to the Federal government by providing an economic disincentive to employees who fail to use government quarters when these quarters are adequate and available. While the provision initially resulted in savings to the government, numerous complaints were raised concerning the lack of uniformity in the implementation of the provision. As a consequence, some opposition emerged to its continuation in the subsequent Appropriation Act. The Agency, itself, requested elimination of the provision. In response to these complaints and statements of opposition, the House Appropriations Committee (House Committee) conducted a review of the implementation of Section 853. In a report containing its findings, the House Committee found that it was necessary to continue the provision in the 1979 Appropriation Act and, in addition, to (1) provide detailed guidance as to what constitutes adequate quarters and (2) require uniform and reasonable application of the provision.6/ Specifically, the report reflected the House

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5/ Section 853 of the Department of Defense Appropriation Act of 1978 provided:

> None of the funds appropriated by this Act or available in any working capital fund of the Department of Defense shall be available to pay the expenses attributable to lodging of any person on official business away from his designated post of duty, or in the case of an individual described under section 5703 of title 5, United States Code, his home or regular place of duty, when adequate government quarters are available, but not occupied by such person.

6/ The report, which accompanied the Appropriation Act of 1979, H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 161, 164 (1978), stated:

> The Committee has again considered this matter and has concluded that Section 853 should remain in the Defense Appropriations Bill. However, it is apparently necessary to provide detailed guidance to the Department of Defense as to what constitute adequate quarters and ensure that other procedures are uniform and reasonable. [Emphasis added.]

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Committee's concern that although the DoD Instruction prescribed the minimum standards of adequacy, it did not provide for the uniform application of the standards by these various activities.7/

Thus, to ensure uniformity in the application of the provision, the House Committee included within its report the following directive to the Agency:

> The Committee expects the Department of Defense to establish policies which will:
>
> > Assure that a civilian employee on TDY would get no lesser accommodations than a private room with a bath shared by no more than one other person.

7/ The House Committee in its report noted the following:

> While OSD prescribes minimum standards of adequacy for transient quarters, each service has its own ideas about the adequacy of the standards. Further, within each service, there are sharp differences of opinion about whether quarters considered adequate for the military are also necessarily adequate for civilian personnel.
>
> . . . . . .
>
> In practice, each of the military services has interpreted and applied these standards in its own way. Navy, in the past, has disregarded them altogether and established its own square footage requirements which were less than the DOD minimums. The discrepancy was attributed to lack of funds for bringing quarters up to DOD minimum levels of adequacy. Navy is now reportedly inventorying its facilities for transient personnel and is committed to discontinue using substandard quarters by October 1978.
>
> Army and Air Force have also gone in different directions in applying the DOD criteria. Army has interpreted the standard to mean that nothing more is required in excess of what the regulation specifies in order to make quarters "adequate." Air Force, on the other hand, has set its own unwritten but higher standard of adequacy which requires more of the comforts and amenities usually associated with a commercial lodging facility. As a result, the difference between Army and Air Force accommodations of similar age and configuration can be striking. H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 161, 163 (1978).

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. . . . . .

> Establish uniform reservation procedures using the DoD autovon system and issue uniform rules for non-availability certificates. [Emphasis added.]

Congress, by issuing such a directive to the Agency, mandated the Agency to provide accommodations which, at least, would meet the above standards and to issue uniform rules governing the issuance of non-availability certificates.

In view of the foregoing, the Authority finds, contrary to the Union's contention, that the proposal is inconsistent with the JTR and the DoD Instruction.8/ That is, the record herein and the legislative history of the Appropriation Acts clearly require a finding that as long as the minimum standards prescribed in the House's directive to the Agency are met, employees on temporary duty are required to utilize those quarters or lose a portion of their per diem allowance. Furthermore, as noted previously, the legislative history is replete with evidence indicating that Congress intended the Agency to issue uniform rules for determining whether to grant certificates of nonavailability. Accordingly, to the extent that the issuance of certificates of nonavailability are based upon whether the quarters involved meet the standards of adequacy specified in the DoD Instruction, these standards must be uniformily applied in order to comply with Congress' mandate. Therefore, contrary to the Union's contention, the DoD Instruction prescribes standards of adequacy which must be uniformly applied in determining whether funds can be disbursed for lodging. To the extent that the Union's proposal exceeds the standards set forth in the DoD Instruction, the proposal is inconsistent with the regulation.

Similarly, the proposal is inconsistent with provisions of the JTR. These provisions reiterate the mandate of the Appropriation Act that funds not be disbursed to employees who fail to use "adequate government quarters" as prescribed in the DoD Instruction unless, among other things, a certificate of nonavailability is issued. Accordingly, to the extent that the Union's proposal would permit disbursement of funds to employees for lodging who fail to use "adequate government quarters" as prescribed in the DoD Instruction, the proposal is inconsistent with the JTR.

Finding the proposal inconsistent with the Agency's regulations, the Authority must now address the issue of whether a compelling need exists for these regulations so as to bar negotiation over the Union's proposal

---

8/ The Agency contends, and the Union concedes, that both the JTR and the DoD Instruction 4165.47 are Agency regulations.

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as claimed by the Agency. In agreement with the Agency, therefore, the Authority finds that a compelling need exists for the JTR and DoD Instruction 4165.47 pursuant to section 2424.11(c) of the Authority's Rules and Regulations.9/ That is, the Agency was placed under a mandate from Congress to prescribe uniform rules for nonavailability certificates.10/ As previously detailed herein, the provisions of the JTR and the DoD Instruction in question reflect this nondiscretionary mandate. Hence, the Agency's regulatory scheme implements a nondiscretionary mandate of law and outside authority. In this connection, the Authority has previously held a Conference Committee report to constitute an "outside authority" within the meaning of section 2424.11(c) of the Authority's Rules and Regulations. See National Federation of Federal Employees, Local 1669 and Arkansas Air National Guard, 13 FLRA 176 (1983), enforced sub nom. National Federation of Federal Employees, Local 1669 v. Federal Labor Relations Authority, 745 F.2d 705 (D.C. Cir. 1984). Likewise, the Authority concludes herein that the House Committee report, which clearly reflects Congress' intent as to the manner in which the relevant provision of the Appropriation Act is to be implemented, constitutes "outside authority" under section 2424.11(c) of the Authority's Rules and Regulations.11/

Inasmuch as the Union's proposal conflicts with the JTR and DoD Instruction, Agency regulations for which a compelling need exists, the

9/ Section 2424.11(c) of the Authority's Rules and Regulations provides:

> § 2424.11 Illustrative criteria.
>
> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> . . . . . .
>
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

10/ This mandate is reflected in Congress' directive to the Agency as stated in the House report and which can be found on pages 7 and 8, supra.

11/ As to the Union's claim that the Appropriation Act is no longer in effect and therefore not binding, the Authority notes that section 853 has appeared, with little modification, in all subsequent Appropriation Acts under various sections including the Department of Defense Appropriation Act of 1985.

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proposal is not within the duty to bargain under section 7117(a)(2) of the Statute.12/

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

12/ In view of the decision herein, the Authority finds it unnecessary to address the remaining contentions of the Agency as to the negotiability of the proposal.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2484

Union

and

Case No. O-NG-898

U.S. ARMY GARRISON,
FORT DETRICK, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents issues concerning the negotiability of two provisions of a negotiated agreement disapproved by the Agency head pursuant to section 7114(c) of the Statute.1/

Provision 1

> Article XI, Section 2 When applicable laws and regulations change the tour of duty, employees will be given two (2) weeks notice in advance of the change. Each employee will receive written notification of the new tour of duty, their schedule and the effective date of the change.

Provision 2

> Article XI, Section 4 A reasonable and equitable effort will be made to rotate employee's non-workdays among different work shifts to be effective at the end of

1/ The Union's petition initially sought Authority review of the Agency head's disapproval of five provisions. However, during the pendency of this appeal the parties reached agreement on three provisions and the Union withdrew its petition as to those provisions. Accordingly only the two provisions on which an agreement was not reached are examined here.

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each work period. The rotation schedule shall be posted not less than one pay period in advance of shift changes and will show thereon the assigned hours and rest days of each employee affected.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination. The Agency's disapproval of both of these provisions is based on the asserted conflict with regulations promulgated by the Office of Personnel Management (OPM), 5 CFR 610.121 (1984),2/ which the Agency contends are Government-wide in effect. The regulation requires, insofar as is here

2/ 5 CFR 610.121 provides, in pertinent part:

> (b)(1) The head of an agency shall schedule the work of his or her employees to accomplish the mission of the agency. The head of an agency shall schedule an employee's regularly scheduled administrative workweek so that it corresponds with the employee's actual work requirements.
>
> (2) When the head of an agency knows in advance of an administrative workweek that the specific days and/or hours of a day actually required of an employee in that administrative workweek will differ from those required in the current administrative workweek, he or she shall reschedule the employee's regularly scheduled administrative workweek to correspond with those specific days and hours. The head of the agency shall inform the employee of the change, and he or she shall record the change on the employee's time card or other agency document for recording work.
>
> (3) If it is determined that the head of an agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so in accordance with paragraphs (b)(1) and (2) of this section, the employee shall be entitled to the payment of premium pay for that period of work as regularly scheduled work under Subpart A of Part 550 of this chapter. In this regard, it must be determined that the head of the agency: (i) Had knowledge of the specific days and hours of the work requirement in advance of the administrative workweek, and (ii) had the opportunity to determine which employee had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement.

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pertinent, that when management knows in advance of an administrative workweek that the actual hours to be worked by an employee will differ from those scheduled in the upcoming administrative workweek, the administrative workweek will be rescheduled to reflect the actual hours to be worked. The regulation also requires that the affected employee will be notified of the change. Failure on the part of management to adhere to these requirements will result in payment to the concerned employee of premium pay for the hours actually worked, in accordance with other governing regulations.

Chapter 61 of Title 5, U.S. Code governs "Hours of Work" for virtually all employees in Executive agencies and military departments. It prescribes, inter alia, that assignments to tours of duty be made in advance over periods of not less than one week, unless such scheduling would handicap an agency in executing its functions. 5 U.S.C. § 6101(c) assigns to OPM responsibility for promulgating regulations, subject to the approval of the President, necessary for administration of the 40 hour workweek and work schedules as they affect employees "in or under an Executive agency." Pursuant to the legislative mandate, OPM issued the cited regulations which likewise govern, inter alia, "work schedules" and are applicable, with minor exceptions not relevant here, "to each employee in or under an Executive agency." In light of these circumstances, it is concluded that the cited regulations are "Government-wide," within the meaning of section 7117(a)(1), in that they are applicable generally to employees in the competitive and excepted service and are binding on heads of Executive agencies, absent a determination that their application will impede the agency in carrying out its functions, as provided by 5 U.S.C. § 6101(a)(3). See American Federation of Government Employees, AFL-CIO, Local 2302 and Department of the Army, Army Armor Center, Fort Knox, Kentucky, 16 FLRA No. 6 (1984).

5 CFR 610.121(b)(2) obligates an agency head to revise an employee's administrative workweek to comport with the hours during which the employee will actually be required to work "[w]hen the head of an agency knows in advance of an administrative workweek" that such revision is necessary. In this regard, the Agency states:

> Thus, if the agency knows one day prior to the beginning of the administrative workweek that actual work requirements and the regular schedule will differ, the regularly scheduled administrative workweek must be rescheduled. Unless this information is available more than two weeks or a pay period in advance, therefore, the notice required by these provisions cannot be given without violating the requirements of the regulation. Language requiring two weeks notice . . . except where the agency learns of the change in work requirements less than two weeks or one pay period before the

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beginning of the administrative workweek would not violate the regulation.3/ [Footnote added.]

The disputed provisions, as the Agency points out, would prevent the Agency head from taking the steps required by the regulations unless he or she became aware of the need to change work schedules not less than two weeks or one pay period prior to the rescheduling. Because the disputed provisions would, in certain circumstances, prevent the Agency from complying with Government-wide regulations, pursuant to section 7117 (a)(1) of the Statute, they are outside the duty to bargain.4/

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ Agency Statement of Position at 2.

4/ Cf. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 15 FLRA No. 158 (1984) (wherein the agency did not raise the regulations as a bar to negotiation on a similar proposal).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and

Case No. 1-CA-30188

DENNIS R. LACROIX, Individual

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and the General Counsel filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings and conclusions,[1/] and his recommended Order as modified.[2/]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Portsmouth Naval Shipyard, Portsmouth, New Hampshire shall:

1. Cease and desist from:

1/ In adopting the Judge's conclusion that the transfer of Lacroix constituted a change in his conditions of employment, the Authority notes particularly that, in addition to working on a different ship with a different crew of employees, Lacroix came under the direction of a new supervisor.

2/ In view of the parties' stipulation of facts concerning the impact of the transfer on employee Lacroix, contained in note 5 of the Judge's Decision, the Authority has determined that the Judge's recommended "make whole" remedy is not appropriate.

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(a) Transferring Dennis R. Lacroix because he utilized his statutory rights to seek union assistance with respect to an incipient grievance concerning working conditions.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Reinstate Dennis R. Lacroix to the work crew that he had been assigned to on April 1, 1983, without prejudice to any seniority or other privileges he would have enjoyed but for his discriminatory transfer effective April 4, 1983.

(b) Post at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT transfer Dennis R. Lacroix because he utilized his statutory rights to seek union assistance with respect to an incipient grievance concerning working conditions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reinstate Dennis R. Lacroix to the work crew that he had been assigned to on April 1, 1983, without prejudice to any seniority or other privileges he would have enjoyed but for his discriminatory transfer effective April 4, 1983.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE NAVY PORTSMOUTH NAVAL SHIPYARD (PORTSMOUTH, NEW HAMPSHIRE) Respondent	
and	Case No. 1-CA-30188
DENNIS R. LACROIX, Individual Charging Party	

Steven Sharfstein, Esquire
For the Respondent

Daniel J. Sutton, Esquire
For the General Counsel

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on April 29, 1983, by Dennis R. Lacroix, an individual, a Complaint and Notice of Hearing was issued on July 26, 1983, by the Acting Regional Director for Region I, Federal Labor Relations Authority, Boston, Massachusetts. The Complaint, which was amended at the hearing without objection, alleges that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire (hereinafter called the Respondent or Shipyard) violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute) by virtue of its

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action in transferring Mr. Dennis Lacroix from one crew to another because of his participation in activities protected by Section 7102 of the Statute. Alternatively, the amended complaint alleges that Respondent violated Section 7116(a)(1) of the Statute by virtue of its action in considering the protected activity of Mr. Lacroix "in determining to transfer Mr. Lacroix from one crew to another crew."

A hearing was held in the captioned matter on September 27, 1983, in Portsmouth, New Hampshire. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on December 5, 1983, which have been duly considered.1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Mr. Lacroix, the charging party herein, has been employed for the past 5 or 6 years at the Portsmouth Naval Shipyard as a pipefitter. Mr. Lacroix is included in the bargaining unit for which the Portsmouth Federal Employees Metal Trades Council (hereinafter called the Union) is the exclusive bargaining representative. For about 4 years prior to April 4, 1983, when he was involuntarily transferred to another crew, Mr. Lacroix was assigned to a crew supervised by Foreman Reginald LeBarge.

In his latest performance appraisal covering the year 1982, Mr. Lacroix was rated by Mr. LeBarge as highly satisfactory, the highest level possible, in all job "performance elements." In this latter connection Mr. LeBarge testified that he "had no problem with his, [Mr. Lacroix's] work."

According to Mr. LeBarge, his main complaint with Mr. Lacroix concerned Mr. Lacroix's actions in making noise at the start of the shift which interfered with Mr. LeBarge's job assignments which were, among other things, predicated upon ongoing telephone conversations from departing supervisors on the earlier shift concerning unfinished work to be performed by Mr. LeBarge's crew.

According to Mr. LeBarge, he had spoken to Mr. Lacroix many times about his actions in being too loud and hollering on the job. Further, according to Mr. LeBarge, he had informed Mr. Lacroix that because of his

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1/ In the absence of any objection, the motion of the General Counsel to correct the transcript is hereby granted.

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noise and the problems that it was causing him, he [Mr. LeBarge], was going to find him another foreman. Mr. Lacroix admits that Mr. LeBarge had complained to him about his actions in making noise and had stated that he was going to seek another foreman for him, Mr. Lacroix. Mr. Lacroix places the conversation and/or statement concerning his possible transfer to another foreman as occurring about 1½ years prior to April 1983.

According to Mr. LeBarge, prior to the events underlying the instant complairt, the only time he actually attempted to effect a transfer for Mr. Lacroix to another foreman occurred some 1½ years prior to April 1983 when he spoke to someone in management and requested that Mr. Lacroix not be returned to his crew following the completion of a special project that Mr Lacroix had been assigned to. Admittedly, no action was taken on this latter request and Mr. Lacroix returned to Mr. LeBarge's crew where he remained until the incidents underlying the instant complaint occurred.

During March of 1983, Respondent instituted a new work permit procedure which resulted in a substantial increase in Mr. LeBarge's paperwork.2/ Subsequently, when the additional paperwork became extremely burdensome, Mr. LeBarge requested help in the form of a "snapper."3/ Pursuant to Mr. LeBarge's request, Respondent assigned Mr. Jerry Letelier to his [Mr. LeBarge's] crew as a "snapper."

On Monday, March 28, 1983, during a regular weekly safety meeting Mr. LeBarge's crew, Mr. Lacroix questioned what Mr. Letelier's future assignments would be and commented that if LeBarge's workload had increased to the point that it was necessary to employ a "snapper", LeBarge should speak to his supervisors and request a more even distribution of the Shipyard's work. LeBarge responded that he had the right to assign employees as he saw fit and, in response to a further question from Mr. Lacroix, stated that there was no medical reason for Mr. Letelier's assignment as a "snapper." Whereupon, Mr. Lacroix stated that he did not think that it was right for Mr. LeBarge to use Mr. Letelier as a "snapper" and that he wanted a union representative present. According to Mr. Lacroix, while Mr. LeBarge did not respond to his request for union representation, he appeared to be perturbed by the request. At this point the meeting ended and the employees returned to work.

2/ Prior to March a single work permit covered a multitude of jobs or tasks to be performed. The new work permit procedure required a separate work permit for each and every job or tasks to be performed.

3/ A snapper is a bargaining unit employee who assists a foreman in accomplishing various administrative tasks such as processing work permits and handing out job assignments.

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Following the meeting, Mr. Lacroix discussed the matter with Mr. Roger Normand, the Union's Chief Steward on the P.M. shift, and asked him to speak to Mr. LeBarge about his practice of utilizing a "snapper." Whereupon, Mr. Normand made contact with Mr. LeBarge and asked him to come over to the welding area for purposes of discussing a problem with Mr. Lacroix.

Mr. LeBarge then accompanied Mr. Normand back to the welding area where a discussion ensued between Mr. LeBarge, Mr. Normand and Mr. Lacroix. According to the credited testimony of Mr. Lacroix and Mr. Normand, Mr. Normand opened the discussion by explaining that Mr. Lacroix had a complaint or potential grievance about the assignment of Mr. Letelier to the crew as a "snapper." Thereafter, Mr. Lacroix chimed in and gave his reasons why he thought the use of a "snapper" was not justified. Whereupon, Mr. LeBarge responded and attempted to justify the use of Mr. Letelier as a "snapper," became irritated and finally informed Mr. Lacroix that he was a trouble maker and that it was time for the two to part. Further, according to Mr. Normand and Mr. Lacroix, Mr. LeBarge became red in the face and began pointing or waving his arms. The meeting ended shortly thereafter without any thing being accomplished.4/

The next day Mr. LeBarge contacted his immediate supervisor, General Foreman Roland Provencher, and asked him to transfer Mr. Lacroix to another crew. Inasmuch as Mr. Provencher, at the time of the request, was looking for employees to transfer to a crew supervised by Foreman Jimmy Knowles he granted Mr. LeBarge's request with little or no discussion. Thus, Mr. Provencher testified that he did not inquire into LeBarge's reasons for requesting the transfer of Mr. Lacroix because LeBarge was upset, the transfer would fulfill Foreman Knowles' staffing needs and alleviate problems on both crews. Further, according to Mr. Provencher the only reason he effected the transfer was because of Mr. LeBarge's request. Finally, Mr. Provencher also testified that had Mr. LeBarge requested the transfer of another employee he "probably" would have transferred such employee rather than Mr. Lacroix.

On April 1, 1983, Mr. LeBarge informed Mr. Lacroix that effective Monday, April 4, 1983, he would be assigned to Mr. Knowles' crew. Mr. Lacroix protested the transfer and informed Mr. LeBarge that he would be filing charges over the involuntary transfer. Whereupon Mr. LeBarge informed Mr. Lacroix that he did not care what Mr. Lacroix did, that he was fed up with Mr. Lacroix's actions, that they had been together long

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4/ Mr. LeBarge acknowledges the meeting, the fact that Mr. Lacroix made it clear that he was dissatisfied with the fact that Mr. Letelier was acting as a snapper; that "maybe" someone mentioned the possibility of a grievance being filed, and that he "blew his stack a little" and told Mr. Lacroix that he "was sick of his bullshit."

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enough and that it was time for them to part. Mr. LeBarge also informed Mr. Lacroix that he would make an effort to make up any overtime that he might lose because of the transfer. Mr. Lacroix told Mr. LeBarge that he could not insure him any overtime since the contract provided that overtime opportunities on a particular boat were to be first offered to the employees working on the particular boat.5/

On Monday, April 4, 1983, Mr. Lacroix was involuntarily transferred from Mr. LeBarge's crew on Boat 605 to Mr. Knowles' crew which was working on Boat 676.

With respect to the reasons for the transfer of Mr. Lacroix, Mr. LeBarge testified that he disliked Mr. Lacroix because of his actions in continually making noise at the start of the shift. He further testified that the Union's role in the March 28th meeting did not play a "hell of a lot" in his decision to transfer Mr. Lacroix. Finally, he testified that he had been trying for a year and one half to transfer Mr. Lacroix and the Union's presence "didn't matter that much."6/

Discussion and Conclusions

The General Counsel takes the position that Respondent's action in transferring Mr. Lacroix was violative of Sections 7116(a)(1) and (2) of the Statute since it was predicated upon Mr. Lacroix complaints made at the meeting set up and attended by Chief Union Steward Normand. Further, according to the General Counsel the absence of any showing that Mr. Lacroix's transfer resulted in a loss of pay or other tangible benefits does not preclude a Section 7116(a)(2) finding. Finally, the General Counsel takes the position that in the event it is concluded that Mr. Lacroix would have been transferred "in the absence of his protected activity" a separate and independent 7116(a)(1) finding is in order since the record establishes that Respondent "considered Mr. Lacroix's protected activity in deciding to transfer him" and thus conveyed to his fellow employees the danger of participating in protected activities.

Respondent takes the position that Mr. Lacroix's transfer was motivated solely by the long standing feud between Mr. Lacroix and Mr. LeBarge and that the March 28, 1983 meeting set up and attended by Mr. Normand played no part in the decision to transfer Mr. Lacroix.

5/ The parties stipulated that the transfer of Mr. Lacroix did not change the duties performed by him, his rate of pay, his shift premium differential or opportunity for overtime work.

6/ In this latter context, Mr. LeBarge failed to cite or give any specific details of any actions taken by him during the past year and one-half to transfer Mr. Lacroix.

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Respondent further argues that a Section 7116(a)(2) finding is not in order since Mr. Lacroix's transfer did not result in any loss of pay or other tangible benefits. Finally, Respondent takes the position that even assuming that the transfer was based on a "mixed motive" within the meaning of Internal Revenue Service v. NTEU, 6 FLRA No. 23, a Section 7116(a)(2) finding is not in order since the evidence supports the conclusion that Mr. Lacroix would have been transferred in any event because of his long standing feud with Mr. LeBarge.

Contrary to the contention of the Respondent, I cannot conclude that Mr. Lacroix's transfer was based solely on his long standing feud with Mr. LeBarge and that Mr. Lacroix's actions during the March 28, 1983 meeting played no part in Mr. LeBarge's decision to seeks his transfer.7/ Rather, I find that Mr. Lacroix's actions at the March 28, 1983 meeting was the proverbial "straw that broke the camel's back" and prompted Mr. LeBarge to actively seeks his transfer.

In reaching the above conclusion, I note that Mr. LeBarge, save for one feeble attempt approximately 1½ years before to transfer Mr. Lacroix, had tolerated Mr. Lacroix, whom he admittedly hated, and had made no active or sustained attempt to effect Mr. Lacroix's transfer prior to his actions in questioning Mr. LeBarge's authority to utilize a "snapper." Other than appearing perturbed, Mr. LeBarge made no significant response to Mr. Lacroix's remarks at the earlier safety meeting concerning the use by Mr. LeBarge of a "snapper." It was only when the matter was pressed by Mr. Lacroix at the later meeting called and attended by Union Steward Normand that Mr. LeBarge lost his cool, raised his voice, and informed Mr. Lacroix that he was tired of his "bullshit" and that it was time for them to split. The next morning, true to his word, Mr. LeBarge requested and successfully obtained Mr. Lacroix's transfer to another crew. In view of the foregoing it is clear, and I so find, that had not Mr. Lacroix sought out Union Steward Normand and prevailed upon him to call the meeting wherein the matter of the use of a "snapper" and the possible filing of a grievance based thereon was discussed in heated terms by Mr. LeBarge and Mr. Lacroix, Mr. LeBarge would have continued to unhappily tolerate Mr. Lacroix's presence on his crew and would not have requested his, Mr. Lacroix's transfer.

Based upon the above considerations and particularly the absence of any showing that Mr. LeBarge had taken any action in the past year and one half to effect the transfer of Mr. Lacroix, I further conclude that the Respondent has failed to sustain the burden of proving by a preponderance of the evidence that Mr. Lacroix would have been transferred irrespective of his participation in activities protected by the Statute.

7/ To the extent that Respondent may contend that the remarks made by Mr. Lacroix at the March 28, 1983, meeting were unprotected, on the basis of the Authority's decision in Internal Revenue Service v. NTEU, supra, I find such contention to be without merit.

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The mere showing that transfers between crews was not an unusual circumstance, that Mr. LeBarge possessed a deep seated hatred for Mr. Lacroix and that approximately one and one-half years earlier Mr. LeBarge had unsuccessfully attempted to have Mr. Lacroix transferred, falls short of establishing that a transfer of Mr. Lacroix in the future was inevitable. Rather, Mr. LeBarge's inaction with respect to a crewman whom he admittedly hated supports the conclusion that but for Mr. Lacroix's participation in protected activities Mr. LeBarge would have, albeit distastefully, continued to tolerate Mr. Lacroix as a member of his crew.

Finally, in agreement with the General Counsel, I conclude that the absence of any showing that Mr. Lacroix's transfer resulted in a loss of pay or other tangible benefits does not preclude a Section 7116(a)(2) finding. Section 7116(a)(2) of the Statute provides that it shall be an unfair labor practice for an Agency to encourage or discourage membership in a labor organization by discrimination in "conditions of employment." Inasmuch as the existing relationships between co-workers or fellow crew men, as the case herein, add to, or subtract from, an enjoyable work environment, I find that a transfer to a new group of co-workers or fellow crew men amounts to a change in a condition of employment.

Having concluded that Respondent violated Sections 7116(a)(1) and (2) of the Statute by virtue of its action in transferring Mr. Lacroix because of his participation in activities protected by the Statute, it is recommended that the Federal Labor Relations Authority adopt the following order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

   (a) Transferring Dennis R. Lacroix or any other unit employees because they utilized their Statutory rights to seek union assistance with respect to an incipient grievance concerning working conditions.

   (b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights assured by Federal Service Labor-Management Relations Statute.

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2. Take the following affirmative action:

(a) Reinstate Mr. Dennis R. Lacroix to the work crew that he had been assigned to on April 1, 1983, without prejudice to any seniority or other privileges he would have enjoyed but for his discriminatory transfer effective April 4, 1983, and make him whole for any loss of monies he may have suffered by reason of the discriminatory transfer which was effective April 4, 1983.

(b) Post at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached Notice marked "Appendix" on forms to be furnished by the Regional Director for Region I, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander of the Portsmouth Naval Shipyard, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where Notices are customarily posted. The Commander shall take reasonable steps to insure that such Notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: January 24, 1984
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT transfer Dennis Lacroix or any other unit employee because they utilized their Statutory rights to seek the assistance of the Portsmouth Federal Employees Metal Trades Council, the exclusive bargaining representative of our employees, with respect to an incipient grievance concerning working conditions.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reinstate Mr. Dennis R. Lacroix to the work crew that he had been assigned to on April 1, 1983, without prejudice to any seniority or other privileges he would have enjoyed but for his discriminatory transfer which was effective April 4, 1983, and make him whole for any loss of monies he may have suffered by reason of such discriminatory transfer.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

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If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116 and whose telephone number is (617) 223-0920.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, LOCALS 2477 and 2910

Union

and

Case No. O-NG-618

LIBRARY OF CONGRESS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of three Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

Section 2D - Any and all standards used by the Library to evaluate the performance of employees shall be fair and equitable and shall be implemented and administered in such a way that every employee can reasonably be expected to obtain the standard.

In American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980), based upon the record before it in that case, particularly the Union's statement as to the intent of its proposal, the Authority interpreted a proposal requiring that performance standards be fair and equitable as providing a criterion for the application to employees of performance standards established by management. The Authority held that such a general, nonquantitative requirement by which the application of performance standards may subsequently be evaluated in a grievance by an employee who believes that he or she has been adversely affected thereby did not directly interfere with management's right, under section 7106(a)(2)(A) and (B) of the Statute, to establish establish performance standards and, thus, was within the duty to bargain.

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In the present case, the Union explicitly interprets its proposal, like the proposal in the Office of Personnel Management case, as prescribing criteria only for reviewing the application of a performance standard to an employee by management; the proposal would not authorize a grievance over the standard itself.1/ Similarly, as to that portion of the proposal which requires that performance standards be so administered that each employee can reasonably be expected to achieve the standards, the Union explicitly states that the proposal does not require that a standard be established at any given level.2/ Rather, the proposal only requires that management's implementation of the standard not deprive an employee of a reasonable opportunity to attain the standard.3/ Under this interpretation, which is adopted for the purpose of this decision, the proposal would not require the Agency to establish a particular performance standard, nor would it permit arbitral review of the standard itself, or otherwise affect the quality, quantity, or timeliness of work production. Cf. American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70, 79-80 (1981), affirmed sub nom. American Federation of Government Employees, AFL-CIO, Local 1968 v. Federal Labor Relations Authority, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926, 103 S.Ct. 2085 (1983), wherein the Authority held that proposals which subject the exercise of management's rights to identify critical elements and establish performance standards to the negotiated grievance procedure are nonnegotiable because they would permit arbitrators to overturn an agency's determination of critical elements and performance standards and render awards which would require the agency to use different elements and standards. In this connection, under the proposal in dispute herein, the arbitrator would only determine whether an employee had had a reasonable opportunity to achieve the standard established by the Agency, i.e., whether the application of the standard was fair and equitable, but would not determine whether the standard itself was fair and equitable. See Union Proposal 5 in Office of Personnel Management, at 790-94 and subsection 4 of Union Proposal 4 in Saint Lawrence Seaway Development Corporation, at 80.

In this regard, the proposal at issue herein is distinguishable from Union Proposal 3 in American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA No. 127 (1984). The proposal at issue in that case, both by its language and by the union's stated intent, required that performance standards themselves be fair and equitable and, unlike the proposal at issue herein, was not restricted to the application of those standards. Thus, the Authority found that the proposal was intended to prescribe limitations on the content of

1/ Union Reply Brief at 5.

2/ Id. at 3-4.

3/ Id.

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performance standards and, as such, authorized arbitrators to substitute their judgment as to the proper content of those standards for that of the agency. Based upon its decision in Saint Lawrence Seaway Development Corporation, therefore, the Authority held that the proposal was nonnegotiable under section 7106(a)(2)(A) and (B) of the Statute. However, as indicated above, the proposal at issue herein, like Union Proposal 5 in Office of Personnel Management, 3 FLRA 784, 790-94 and subsection 4 of Union Proposal 4 in Saint Lawrence Seaway Development Corporation, 5 FLRA 70, 80, would not authorize an arbitrator to review the Agency's determination of its performance standards, but only to consider whether the standards which had been established were applied in a fair and equitable manner.

Accordingly, for the reasons set forth above, in particular the Authority's dispositions as to Union Proposal 5 in Office of Personnel Management, 3 FLRA 284, 790-94 and subsection 4 of Union Proposal 4 in Saint Lawrence Seaway Development Corporation, Union Proposal 1 herein is within the Agency's duty to bargain under the Statute.

Union Proposal 2

Section 6B - An employee given an "Outstanding" rating shall receive an incentive award.

Union Proposal 3

Section 6D - An employee whose performance substantially exceeds normal requirements in one or more of the most important job elements will be given a special achievement award under 5 USC 45.

Union Proposals 2 and 3 prescribe the levels of achievement under the Agency's performance appraisal system which are sufficient to entitle an employee to an incentive award. In thus establishing the criteria governing the Agency's decision to reward employee performance, these proposals are substantially to the same effect as Union Proposals 5 and 6 in National Treasury Employees Union and Internal Revenue Service, 14 FLRA 463, 469-471 (1984) (Member Haughton dissenting), appeal docketed sub nom. National Treasury Employees Union v. Federal Labor Relation Authority, No. 84-1292 (D.C. Cir. July 9, 1984). In that case, the Authority, in considering the negotiability of those proposals, which concerned incentive pay, stated as follows:

> . . . [A]n integral aspect of management's exercise of its rights to assign work and direct employees is to establish a system of rewards and sanctions for employee performance, including the provision of incentives to encourage and reward superior performance. The nature of the incentive (e.g., monetary or nonmonetary), the

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> amount of a monetary incentive, and the circumstances under which an incentive may be awarded are essential components of management's judgment. That is, they directly relate to the potential success of the incentive in motivating the performance of particular job tasks and, hence, to some extent determine the priorities for accomplishing the agency's work.

The Authority determined, therefore, that because those proposals "prescribed" the amount of the award of incentive pay and the circumstances under which it would be paid, the proposals directly interfered with management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute and were outside the duty to bargain. In a similar manner, Union Proposals 2 and 3 herein are determinative of the conditions under which the Agency will grant an incentive award, i.e., the attainment of a stated level of achievement or performance rating. Thus, for the reasons more fully set forth in the Internal Revenue Service case, Union Proposals 2 and 3 directly interfere with management's rights, under section 7106(a)(2)(A) and (B), to direct employees and assign work through the establishment of rewards for employee performance[4/] and, thus, are outside the duty to bargain.[5/]

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Union Proposals 2 and 3 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 1.[6/]

Issued, Washington, D.C., May 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ The Union explicitly concedes that the proposals concern rewards for employee performance. Union Reply Brief at 8.

5/ In view of the Authority's decision herein, it is unnecessary to consider the Agency's arguments that the proposals are outside the duty to bargain.

6/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 32

Union

and

Case No. O-NG-924

OFFICE OF PERSONNEL MANAGEMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of seven Union proposals.1/ Upon careful consideration of the entire record,2/ including the parties' contentions, the Authority makes the following determinations.

1/ In its response to the Union's petition for review, the Agency withdrew its allegation as to an additional proposal concerning career ladder promotions. Accordingly, there is no longer an issue as to whether that proposal is within the duty to bargain. The Agency's contention that a number of proposals in this case are outside the duty to bargain because they are unrelated to the Agency's proposed Affirmative Action Plan cannot be sustained. In this regard, the Authority decides only the negotiability issues presented under section 7105(a)(2)(E) of the Statute. To the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, such issues should be raised in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

2/ The Union did not file a Reply Brief in this case.

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Union Proposal 1

Section 1. At least 15 current employees will be trained as personnel staffing specialist (GS-212-5/7) during fiscal year 1983.

This proposal, on its face, would require the Agency to train certain employees as "personnel staffing specialists (GS-212-5/7)" within the period of a fiscal year. In National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Union Proposals I through III), the Authority held that proposals which prescribed the type of training to be assigned as well as its frequency and duration interfered with the agency's right to assign work pursuant to section 7106(a)(2)(B). Hence, since Union Proposal 1, herein, expressly seeks to establish the type of training to be provided to employees, i.e., personnel staffing specialist training, it is, based upon Federal Aviation Administration, and the reasons and cases cited therein, not within the duty to bargain.3/

Union Proposal 2

Section 2. Entries in employees' individual development plans constitute a commitment to provide the indicated training and promotions, subject to the employees meeting applicable requirements.

Union Proposal 2 is to the same effect as a proposal found to be outside the duty to bargain in American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA No. 10 (1984) (Union Proposal 2). In that decision, the Authority held that a proposal which would mandate provision of the exact training indicated by entries in an employee development plan violated the agency's right to assign work pursuant to section 7106(a)(2)(B) as it would, in effect, specify the type of training to be provided. The Agency asserts, without contravention, that Union Proposal 2, herein, likewise requires management to provide the exact type of training specified in the individual

3/ In view of this disposition, it is unnecessary to address the Agency's further contention that this proposal is inconsistent with the Agency's right to determine "the numbers . . . of employees . . . assigned" pursuant to section 7106(b)(1) of the Statute.

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development plan. Hence, based on Office of Personnel Management and the case cited therein, Union Proposal 2 is outside the duty to bargain.4/

Union Proposal 3

Section 3. Performance standards, as well as their application, must be fair.

In agreement with the Agency, the Authority concludes that to the extent Union Proposal 3 would require performance standards themselves to be fair, it is to the same effect as the disputed portion of a proposal found to be outside the duty to bargain in American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA No. 127 (1984) (Union Proposal 3), petition for review filed sub nom. Local 32, American Federation of Government Employees, AFL-CIO v. FLRA, No. 85-1038 (D.C. Cir., Jan. 16, 1985). In that decision the Authority held that the disputed portion of a proposal which provided "performance standards . . . must be fair and equitable" violated management's rights to assign work and direct employees pursuant to section 7106(a)(2)(A) and (B) of the Statute. Specifically, the Authority indicated that while a proposal limited to establishing a general nonquantitative requirement by which the application of performance standards could subsequently be evaluated in a grievance would be a negotiable appropriate arrangement pursuant to section 7106(b)(3) of the Statute according to the holding in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980) (Union Proposal 5), a proposal which was specifically directed at the content of the performance standards themselves would have the effect of permitting arbitrators to substitute their judgment as to the content of performance standards for that of the agency and would constitute a substantial interference with management's rights. Consequently, based on Office of Personnel Management, 16 FLRA No. 127, and the cases cited therein, Union Proposal 3 herein is outside the duty to bargain.

Union Proposal 4

Section 4. Wherever feasible, jobs will be redesigned in order to create career paths allowing employees now in deadend jobs to be promoted non-competitively.

4/ In view of this disposition, it is unnecessary to address the Agency's further contention that this proposal is inconsistent with management's right to make selections pursuant to section 7106(a)(2)(C) of the Statute.

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Essentially, Union Proposal 4 would result in the Agency being required to alter its current organizational grade level structure, whenever it was possible to do so, in order to provide promotion opportunities for employees in "deadend jobs." In this respect, the Authority determined in National Association of Government Inspectors and Quality Assurance Personnel, Unit #2 and Naval Air Engineering Center, Lakehurst, New Jersey, 8 FLRA 144 (1982) (Union Proposal 1), that a proposal which required an agency's organizational grade level structure to be designed to provide, among other things, promotion opportunities for certain employees in deadend positions, conflicted with the Agency's right to determine its organization pursuant to section 7106(a)(1) of the Statute. Thus, to the extent Union Proposal 4 would require the Agency to change its organization grade structure it is, based on Naval Air Engineering Center, Lakehurst, inconsistent with management's right to determine its organization pursuant to section 7106(a)(1) of the Statute.

Moreover, Union Proposal 4, herein, would require that "jobs will be redesigned" in order to achieve grade level organization changes. In other words, the Agency would be required to reassign duties currently assigned to positions or employees to other positions in order to create the requisite number of positions at certain grades into which employees with lower grades could be promoted. Thus, Union Proposal 4 expressly would also interfere with the Agency's right pursuant to section 7106(a)(2)(B) of the Statute to determine the particular employee to whom, or position to which, duties will be assigned. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Union Proposal XVI), enforced as to other matters sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). Consequently, as Union Proposal 4 would directly interfere with these management rights, individually and collectively, it is outside the duty to bargain.

Union Proposal 5

> Section 6. No position will be filled from outside OPM unless OPM employees have been given the opportunity to compete for it with the outside applicants. The availability of every vacancy that is to be filled will be announced using the merit promotion process. In-house and outside applicants will be rated and ranked on the basis of their qualifications as matched against the knowledges, skills, abilities and other characteristics that are accurate indicators of the likelihood of success in the positions applied for. If members of any group which is covered by the EEO regulations are under-represented at the series and grade of the position, and members of such groups apply for and are qualified for the position, no lesser ranked member of a non-under-represented group will be selected. [Only the underlined portion is in disputed.]

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Section 7106(a)(2)(C) of the Statute reserves to management the right to make selections for appointments from among properly ranked and certified candidates for promotion or from any other appropriate source. In this respect, in American Federation of Government Employees, AFL-CIO, Local 2578 and General Services Administration, National Archives and Records Service, Washington, D.C., 3 FLRA 604 (1980), the Authority determined that a proposal which set forth a certain statistical goal for the elimination of underrepresentation in the workforce by women and minorities but which did not require management to take or refrain from taking any specific action toward the achievement of that goal did not, among other things not here relevant, prohibit management from exercising its rights pursuant to section 7106(a)(2)(C) of the Statute. The disputed portion of Union Proposal 5 herein, however, would expressly prohibit management from exercising its rights pursuant to section 7106(a)(2)(C) in the circumstances described in the proposal. That is, management would be precluded from selecting a qualified candidate for a position if there existed any other candidate who was a member of an underrepresented group and who had a higher ranking. Moreover, if there was only one member of an underrepresented group who had a higher ranking than the candidate management proposed to select, the disputed portion of the proposal would have the effect of mandating the selection of a particular individual. Therefore, as the disputed portion of Union Proposal 5 would directly interfere with management's right to select pursuant to section 7106(a)(2)(C) of the Statute, it is outside the duty to bargain.

Union Proposal 6

> Section 7. The agency shall establish free, high-quality day care facilities for the children of bargaining unit OPM employees.

Union Proposal 7

> Section 8. There will be no change in the central office operations hours, flexible hours, or core hours. Employees in the Washington area office are added to the alternative work schedule plan.

It appears from the record in this case that the Agency is not contending that disputed proposals 6 and 7, also submitted by the Union in collective bargaining over the Agency's proposed Affirmative Action Plan, are nonnegotiable. That is, with respect to Proposal 6, the Agency notes that the Authority has previously determined a proposal requiring the providing of day care facilities to be within the duty to bargain.5/

5/ American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 6 FLRA 423 (1981) enforced sub nom. Office of Personnel Management v. FLRA, 706 F.2d 1229 (D.C. Cir. 1983).

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The Agency then states, "[t]he negotiability of the subject of [Proposal 6] is not in dispute."6/ [Emphasis in original.] Rather, the Agency contends that it has no duty to bargain on Proposal 6 because it is unrelated to the Affirmative Action Plan proposed by the Agency. Similarly, with regard to Proposal 7, the Agency states, "[a]s in [Proposal 6] the Union is attempting to 'shoehorn' the full range of working condition proposals into impact and implementation bargaining on a discrete matter."7/ Consequently, as the Agency has made no allegation that Union Proposals 6 and 7 are nonnegotiable, there is no issue as to whether these two proposals are within the parties' duty to bargain under the Statute. Cf. American Federation of Government Employees, AFL-CIO, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Area Native Health Service, 13 FLRA 697 (1984) (wherein the Authority found that failure to respond to a union's request for an allegation was constructive declaration of nonnegotiability so as to give rise to a right of appeal.)

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 7, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

6/ Agency Statement of Position at 8.

7/ Id. at 9.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-66

Respondent

and

Case No. 4-CO-30026

JAMES A. CONFER, JR., An Individual

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the General Counsel filed exceptions to the Judge's Decision, and a supporting brief.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, except as modified herein.

Noting particularly the absence of any exceptions thereto, the Authority adopts the Judge's conclusion that the Respondent Union violated section 7116(b)(1) of the Statute by expelling James Confer, a Union member, because he filed or caused other employees to file unfair labor practice charges under the Statute against the Respondent Union.1/ The record supports the Judge's finding that Confer was removed from Union membership for engaging in such protected activity under the Statute. Thus, the Respondent interfered with the protected rights of employees

1/ In view of this finding, it is unnecessary to pass upon the allegation that such actions also violated section 7116(b)(8) of the Statute, as the remedy in any event would be the same.

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under section 7102 of the Statute "to form, join, or assist any labor organization, or to refrain from any such activity."[2/]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the National Association of Government Employees, Local R5-66, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its members in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by expelling, fining, or otherwise disciplining a member because he has filed, or has caused other employees to file, unfair labor practice charges against the National Association of Government Employees, Local R5-66, with the Authority.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to carry out the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Unconditionally offer to reinstate James A. Confer, Jr., as a member in good standing of the National Association of Government Employees, Local R5-66, with full rights of membership, and, if tendered, accept payment of his dues uniformly required as a condition of retaining membership, either by direct payment by Mr. Confer or by allotment pursuant to section 7115(a) of the Statute, covering the period beginning with his receipt of the unconditional offer of reinstatement.

2/ Cf. National Treasury Employees Union and National Treasury Employees Union, Chapter 53, 6 FLRA 218 (1981) (wherein the Authority found that the right guaranteed to employees under section 7102 of the Statute to form, join, or assist any labor organization, or to refrain from such activity, is sufficiently broad to include within its scope the right of an employee to appear as a witness in an Authority proceeding to which the Union is a party and to give testimony supporting or opposing the Union's interest in that proceeding).

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(b) Rescind the decisions of the Trial Board of the National Association of Government Employees, Local R5-66, of June 24, 1983 and January 5, 1984, with respect to James A. Confer, Jr.

(c) Post at the business office of the National Association of Government Employees, Local R5-66, and in normal meeting places, including places where notices to members of and unit employees exclusively represented by the National Association of Government Employees, Local R5-66, are customarily posted, copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the president of the National Association of Government Employees, Local R5-66, or a designee, and shall be posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and to other employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Submit appropriate signed copies of said Notice to the Veterans Administration Medical Center, Memphis, Tennessee, for posting in conspicuous places where unit employees exclusively represented by the National Association of Government Employees, Local R5-66, are located, where they shall be maintained for 60 consecutive days from the date of posting.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce our members in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by expelling, fining, or otherwise disciplining a member because he has filed, or has caused other employees to file, unfair labor practice charges against the National Association of Government Employees, Local R5-66, with the Authority.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL unconditionally offer to reinstate James A. Confer, Jr., as a member in good standing of the National Association of Government Employees, Local R5-66, with full rights of membership, and, if tendered, accept payment of his dues uniformly required as a condition of retaining membership, either by direct payment by him or by allotment pursuant to section 7115(a) of the Statute, covering the period beginning with his receipt of the unconditional offer of reinstatement.

WE WILL rescind the decisions of the Trial Board of the National Association of Government Employees, Local R5-66, effective June 24, 1983 and January 5, 1984, with respect to James A. Confer, Jr.

_____
(Union)

Dated: _____ By: _____
(Signature) (Title)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1776 Peachtree Street, NW., Suite 501, North Wing, Atlanta, Georgia 30309, and whose telephone number is: (404) 881-2324.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-66 Respondent and James Confer, Jr., An Individual Charging Party	Case No.: 4-CO-30026

Richard G. Remmes, Esquire
For Respondent

Pamela B. Jackson, Esquire
Brief by: Edward P. Nichols, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns, first, whether, under the Statute, a union may expel a member for any reason other than the failure to tender dues uniformly required and, second, whether, if it may expel a member for reasons other than the failure to tender dues, it may expel a member filing, or for inducing and encouraging other employees to file, unfair labor practice charges under the Statute against the union. This proceeding was initiated by a charge, filed on July 5, 1983 (G.C. Exh.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g. Section 7116(c) will be referred to, simply, as "§ 16(c)."

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1(a)), and a First Amended Charge, filed on August 26, 1983 (G.C. Exh. 1(c)). The Complaint and Notice of Hearing issued on August 30, 1983 (G.C. Exh. 1(e); the Notice of Hearing stated that the date and place of hearing would be designated later; by Order dated November 16, 1983 (G.C. Exh. 1(d)), the hearing was set for December 12, 1983, in Memphis, Tennessee; and pursuant thereto a hearing was duly held on December 12, 1983, in Memphis, Tennessee, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and were afforded, and exercised, the opportunity to present oral argument; however, oral argument served only to highlight, not to explore, the issues. At the close of the hearing, January 12, 1984, was fixed as the date for mailing post hearing brief and each party has timely mailed a brief, received on, or before, January 16, 1984, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

The facts are not in dispute as the only witness, called by the General Counsel, was Mrs. Drew Boykin, a/k/a Mrs. Tommie Boykin, President of National Association of Government Employees Local R5-66 (hereinafter, also, referred to as the "Union"). The Union represents certain non-professional employees of the Memphis Veterans Administration Medical Center as more fully set forth in Paragraph 5(a) of the Complaint (G.C. Exh. 1(e)).

1. The VA Hospital employees have been represented since 1958 or 1959; initially, by American Federation of Government Employees, Local 1890; then by an independent union AGEA Local No. 1; and since about August, 1968, by the Union. Mr. Boykin had been president of each local union from 1958, or 1959, until his death in June, 1974 (Tr. 47-49); Mrs. Boykin, although not a government employee (Tr. 49), was elected president in August, 1974, and has served as president continuously since 1974. Mr. James Confer is an employee of the VA Hospital (Tr. 10-11); was a member from the time the Union was an independent and remained a member, except for a period when he resigned and later re-joined (Tr. 50-51),[2/] until his expulsion, as more fully set forth hereinafter; at one time was vice president of the Union; and had twice been a candidate for president of the Union and lost on each occasion to Mrs. Boykin (Tr. 51-52).

[2/] As General Counsel notes in his Brief,

"Although not relevant to this proceeding, it apparently took the filing, processing and settlement of an unfair labor practice charge for Confer to become a member of Respondent. (Tr. 50-51)" (G.C. Brief, p. 2, n. 2.)

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2. On, or about, May 31, 1983, an unfair labor practice charge was filed with the Authority by a Ms. Dorothy B. Call (Case No. 4-CO-30022; G.C. Exh. 6). Upon receipt of the unfair labor practice charge, Mrs. Boykin testified that a ". . . stewart came to me and said that . . . she [Call] had gone to Mr. Confer for help and that his help was bringing her ULPs to sign. . . ." (Tr. 16), she contacted the other members of the Union's Executive Board to ". . . to ask permission to bring charges" (Tr. 21) against Mr. Confer. Indeed, Mrs. Boykin conceded that,

> "The immediate reason why I contacted t' .on's Local Executive Board concerning the expulsc. .mes Confer was an incident involving Confer and an . .ployee, Dorothy Call." (Tr. 24).

3. Mrs. Boykin proceeded to write up charges against Mr. Confer, together with a covering letter, dated June 24, 1983 (G.C. Exh. 9), advising Mr. Confer, inter alia, that "The attached charges of misconduct have been brought against you by the Executive Board of the Local"; that "The NAGE Trial Board will meet Saturday, July 9, 1983 at 9:00 a.m. . . . for a hearing on these charges." The Charge of Misconduct, attached to Mrs. Boykin's letter, asserted conduct in violation of the National Constitution and By Laws;[3/] stated generally, in the language of the Union's Constitution and By Laws, that Mr. Confer had "engaged in actions that have been conducive to secessionists movements in that you have recommended that employees use either you or your attorneys as representatives rather than avail themselves of representation by this Local. You have willfully circulated libelous and slanderous false statements and reports concerning officers, members and activities of the Local. You have maliciously brought or encouraged as well as aided others in bringing false charges against officers and members of the Local without reasonable grounds for believing such charges to be true. You, in fact, have known that these charges were not true. All of the above actions have been for the deliberate purpose of causing internal dissension and disruption", by the following specific acts:[4/]

[3/] Article V, Section 1. (b) "Engaging in any activity or course of conduct contrary or detrimental to the welfare or best interests of the National Association of Government Employees or of a subordinate body, or member."; (d) "Engaging in a secessionist movement or a movement which has for its purpose the fostering of a rival organization"; and (e) "Slandering or libeling an officer or member . . ., or willfully circulating false statements or reports concerning such officers or members, or concerning the activities of the National Association . . . or its subordinate bodies, or otherwise engaging in malicious activities such as the circulation of false statements for the deliberate purpose of causing internal dissention and disruption." (G.C. Exh. 2).

[4/] The specific grounds asserted are not quoted but are briefly summarized.

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1. In June, 1982, you attempted to represent a VA Hospital technician in a promotion grievance.

2. Another employee sought to use your attorney as his representative and stated that you and a former president of an AFGE Local had assisted him in preparing his grievance.

3. In June, 1982, you circulated an unfair labor practice petition (actually a charge- see G.C. Exh. 7) and garnered 50 signatures. The charge (actually filed on August 16, 1982, not June 22, 1982, as stated by Mrs. Boykin) alleged failure to represent, allowing time limits on grievances to expire, etc.

4. In October, 1982, former steward Clyde Gatewood filed an unfair labor practice petition [charge] (G.C. Exh. 4) which was handled by you as the envelope was addressed in your handwriting.

5. In November, 1982, Emma Jordan filed an unfair labor practice petition [charge] (G.C. Exh. 5), which was also handled by you as the envelope was addressed in your handwriting.

6. In October, 1982, you requested that the President assist you in resolving a complaint you had filed alleging excessive use of sick leave by female employees.

7. In April, 1983, a steward was asked to type a letter to the Hospital Director requesting that you be represented by someone other than the President.

8. In May, 1982 (actually 1983), see G.C. Exh. 6), you persuaded Ms. Dorothy B. Call to file an unfair labor practice petition [charge].

4. Mrs. Boykin testified that the Authority issued no complaint on any of the unfair labor practice charges (G.C. Exhs. 4, 5, 6, 7) (Tr. 50); however, the record does not show the disposition of any charge referred to[5/] in the internal Union charges against Mr. Confer, and the record affirmatively shows that Mrs. Boykin took immediate action against Mr. Confer upon receipt of the Call unfair labor practice charge.

5/ The record does show, as noted above in footnote 2, that Mr. Confer's prior restoration to membership had been in settlement of an unfair labor practice charge.

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5. Although the statement of charges against Mr. Confer contained matters unrelated to the filing of unfair labor practice charges pursuant to § 16(b) of the Statute (See, Paragraph 3, above, numbered specific acts 1, 2, 6 and 7), it is clear, from the statement of charges and from the testimony of Mrs. Boykin, that the central and controlling gravamen of the charges, and the grounds asserted at the Union's hearing thereon, was that Mr. Confer ". . . willfully circulated libelous and slanderous false statements and reports concerning officers, members and activities of the Local"; that he "maliciously brought or encouraged as well as aided others in bringing false charges against officers and members of the Local without reasonable grounds for believing such charges to be true"; and that he had known ". . . that these charges were not true", all of which concerned the unfair labor practice charges filed with the Authority pursuant to § 16(b) of the Statute (Tr. 11-12, 13-14, 15, 16, 19, 23, 24, 25, 26-27, 29, 30, 31, 33, 34, 36, 37, 46, 47, 63-64).

6. The Union's Trial Board met, pursuant to the notice to Mr. Confer dated June 24, 1983 (G.C. Exh. 9), on July 9, 1983; Mr. Confer did not appear (Tr. 40); Mrs. Boykin and other witnesses testified in support of the charges; and the Trial Board, after deliberating 15 to 20 minutes (Tr. 39), rendered its decision to expel Mr. Confer from the Union (Tr. 39).

7. By letter dated July 18, 1983 (G.C. Exh. 8), Mrs. Boykin, as President, advised the Chief, Fiscal Division, V.A. Hospital, Memphis, Tennessee, that,

> "Mr. James A. Confer is no longer a member of NAGE Local R5-66. Please remove his name from our dues deduction listing as soon as possible but no later than the next full pay period." (G.C. Exh. 8).

Conclusions

A. Power of unions to expel from membership.

The threshhold question is whether a union may expel a member for any reason other than the failure to tender dues uniformly required. As the Authority has previously held, when internal affairs of the union clearly are involved, discipline, including expulsion, is not cognizable under § 16(b) of the Statute as an unfair labor practice; however, any such discipline is subject to § 20 of the Statute and any complaint of violation of § 20 shall be filed with the Assistant Secretary of Labor for Labor-Management Relations pursuant to § 20(d) of the Statute (5 U.S.C. § 7120(d)), and the Regulations duly issued thereunder, 29 C.F.R. Parts 207, 208 and 209. American Federation of Government Employees, Local 2000, AFL-CIO and Wilder M. Mixon, An Individual, 8 FLRA No. 125, 8 FLRA 718 (1982); American Federation of Government Employees, Local 945, AFL-CIO (Veterans Administration Medical Center, Tucson, Arizona) and Linda S. Moore, An Individual, Case No. 8-CO-20006-2, Administrative Law Judge Decisions Report No. 30, September 2, 1983. See, also, Local 1858, American Federation of Government Employees (Redstone Arsenal, Alabama),

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A/SLMR No. 275, 3 A/SLMR 274 (1973); American Federation of Government Employees, Local 1650, Beeville, Texas (Naval Air Station, Chase Field, Beeville, Texas), A/SLMR No. 294, 3 A/SLMR 416 (1973); American Federation of Government Employees, Local 987, A/SLMR No. 420, 4 A/SLMR 509, 511 n. 5 (1974). Although the Authority in Wilder M. Mixon, supra, directly held that,

> ". . . the allegation in the complaint may not be litigated under section 7116 of the Statute. In this regard, the matters at issue involve allegations that certain of the Respondent's conduct was inconsistent with and violative of its constitution and bylaws, and thus are matters within the exclusive jurisdiction of the Assistant Secretary of Labor pursuant to the provisions of section 7120 of the Statute. . . ." (8 FLRA at 718)

as a concomitant part of the decision, adopted by the Authority, was the conclusion that Wilder M. Mixon's expulsion, for reasons other than the failure to tender dues, did not violate rights protected by § 2 of the Statute for the reasons that,

> "The concluding sentence of § 16(c) (footnotes omitted) is substantially similar to the proviso to § 8(b)(1)(A) of the National Labor Relations Act, indeed Section 9(b)(1) of H.R. 1589, introduced by Congressman Ford on January 10, 1977, reflected the format and followed the language of 8(b)(1)(A) and while other bills, as well as the language as enacted, removed the provision from (b)(1) and placed it in 16(c), the Legislative History reflects a conscious intent to 'track' the substantially similar provision of the NLRA. I conclude, fully in agreement with the well reasoned decision of Judge Sternburg, in National Treasury Employees Union and National Treasury Employees Union, Chapter 53, Case No. 2-CO-3 (ALJ July 15, 1980) [adopted and affirmed by the Authority, 6 FLRA No. 37, 6 FLRA 218 (1981)], that the concluding sentence of § 16(c) of the Statute, as does the proviso to 8(b)(1)(A) of the NLRA, 'assures a union freedom of self regulation where internal affairs are concerned' although such freedom of regulation does not extend to, or encompass the imposition of penalties, 'for utilizing or participating in the Authority's processes. . . .' . . . ." (8 FLRA at 728).

Although the Regional Attorney in his Brief concedes that, "The case law developed under the Statute indicates that a Union apparently may expel an employee . . . and be subject only to judgment by the Secretary of Labor pursuant to Section 7120 of the Statute, unless its reasons include the employee resort to the processes of the Authority. . . ."

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(General Counsel Brief, pp. 5-6); that ". . . the General Counsel submits that there exist valid bases upon which Respondent could have expelled Confer . . . but once Respondent embarked upon a course of expelling Confer because of his participation in Authority proceedings . . . its basis for expulsion is unlawful" (General Counsel Brief, p. 5); and squarely bottoms the unfair labor practice asserted herein on the fact that Mr. Confer was expelled because he filed, or assisted others in filing, unfair labor practice charges with the Authority and ". . . once the sanction of expulsion is visited for resort to the Authority's procedures, the matter enters the public domain because the unfettered access to the third-party adjudicatory body (the FLRA) is paramount" (General Counsel Brief, p. 6); nevertheless, as Respondent asserts advice to the contrary[6/] (Respondent's Brief, Attachment A), it is both appropriate and necessary to address the issue, namely whether a union may expel a member for any reason other than the failure to tender dues. The qualification relied upon by the General Counsel, i.e. imposition of discipline, including expulsion, for resort to the Authority's procedures, is treated hereinafter.

§ 16(c) of the Statute provides as follows:

> "(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representation except for failure -
>
> "(1) to meet reasonable occupational standards uniformly required for admission, or
>
> "(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

6/ Respondent represents that the Union's Trial Board reconvened on January 5, 1984, to reconsider the penalty imposed on Mr. Confer in July, 1983, because, ". . . a Law Judge has informed the Union that the Department of Labor regulations prohibits the expulsion of a union member except for non-payment of dues and/or assessments." (Respondent's Brief, Attachment A).

The basis for this assertion is not further shown; but if, contrary to the representation, it stemmed from the colloquy at the hearing between counsel for Respondent and the undersigned in which counsel was asked to address in his brief whether, under the Statute, "does discipline include the right of expulsion or do you have to discipline in some other manner under the Statute" (Tr. 70), the assumption if made from the question posed was without foundation, was made in error, and was wrong.

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> This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter." (Emphasis supplied) (5 U.S.C. § 7116(c)).

§ 15 of the Statute, "Allotments to representatives," in subsection (a) provides for written assignments for deduction of union dues and in subsection (b) provides, in relevant part, as follows:

> "(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when -
>
> . . .
>
> (2) the employee is suspended or expelled from membership in the exclusive representative." (Emphasis supplied) (5 U.S.C. § 7115(b)).

As stated in Mixon, supra, the legislative history of the concluding sentence of § 16(c) of the Statute reflects a conscious intent to "track" the substantially similar provision of proviso to Section 8(b)(1) the National Labor Relations Act. § 16(a)(2) of the Statute is the counterpart of Section 8(a)(3) of the NLRA.7/ The statutory language of

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7/ Section 8(a)(3) of the NLRA provides for union shop agreements which, of course, are not authorized or permitted by the Statute. To more easily follow the references to the statutory language in decisions under the NLRA, the applicable text of 8(a)(3) and of 8(b)(1) and (2) may be helpful:

"8(a) It shall be an unfair labor practice for an employer -

. . .

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .[union shop proviso] Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership

(continued)

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Sections 8(a)(3), 8(b)(1) and (2) of the NLRA; the legislative history of the Labor Management Relations Act, 1947; and the decisions thereunder make it clear that union discipline, vis-a-vis the union, was left to the unions (subject, however, to various legal standards and strictures, See, Summers, "Legal Limitations in Union Discipline", 64 Harv. L. Rev. 1049 (1951); and, later, also to the provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, et seq., and in particular Subchapter II - "Bill of Rights of Members of Labor Organizations", §§ 411 - 415, Pub. L. 86-257, 73 Stat. 519, et seq., September 14, 1959), i.e., labor organizations, pursuant to the proviso to Section 8(b)(1) were free to prescribe their own rules with respect to the acquisition or retention of membership therein so long as such action did not affect the individual's employment; but when employment was affected, then the second proviso to Section 8(a)(3) governed and no employer may discriminate against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender dues and initiation fees uniformly required. Further, a union violates Section 8(b)(2) if it causes, or attempts to cause, an employer to violate Section 8(a)(3) with respect to an employee

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(continued)

> was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

"§ 8(b) It shall be an unfair labor practice for a labor organization or its agents -

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (29 U.S.C. § 158(a)(3); 158(b)(1) and (2)).

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to whom membership has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required.

The legislative history of the Labor Management Relations Act, 1947 (Taft-Hartley), which added all of the provisions in question, makes it clear that Congress intended that labor organizations were free to prescribe and to invoke their own rules except when implementation of such rules affect an employee's employment rights. For example:

> "MR. TAFT: The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion." (Cong. Rec., Senate, April 29, 1947, p. 4318, Legislative History of the Labor Management Relations Act, 1947 [80th Congress], printed for the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Cong., 2d Sess. (January 1974), p. 1097 (hereinafter referred to as "Legislative History - LMRA" followed by the page number of the Committee print).
>
> . . .
>
> "MR. TAFT: . . . The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.
>
> "MR. PEPPER: Am I correct in assuming that it is the interpretation of the Senator from Ohio and the Senator from Minnesota that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership, there is no provision in the bill which denies it the privilege of doing so?

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"MR. BALL: Absolutely not. If the union expels a member of the union for any other reason than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. It can expel him from the union at any time it wishes to do so, and for any reason.

"MR. PEPPER: And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.

"MR. BALL: That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him." (Cong. Rec., Senate, April 30, 1947, pp. 4400-4401; Legislative History - LMRA, p. 1142).

The decisions of the Board and of the courts also make this clear. For example, in International Typographical Union, 86 NLRB 951, 25 LRRM 1002 (1949), although various other violations were found, including violations of 8(b)(2) and 8(b)(1)(B), the Board found that the threatened expulsion of any member for refusing to cooperate in the operation of the union's unlawful "Collective Bargaining Policy" did not violate Section 8(b)(1)(A), for the reason that,

". . . In our view, by including this proviso Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscription of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees." (86 NLRB at 957, 25 LRRM at 1006).

In Minneapolis Star & Tribune Co., 109 NLRB 727 (1954), the Board found violations of 8(b)(1)(A), 8(b)(2), 8 (a)(3) and 8(a)(1) by discrimination as to an employee's right to work and for placing an employee at the bottom of the seniority list for failure to report for picketing duty during a strike, but held that imposition of a $500.00 fine did not violate 8(b)(1)(A), because,

". . . It is well established that the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization." (109 NLRB at 729).

In NLRB v. Local 815, Teamsters (Montauk Iron & Steel Corp.), 290 F. 2d 99, 48 LRRM 2065 (2d Cir. 1961), the Court held that the union violated 8(b)(1)(A) and 8(b)(2) by requiring employer to terminate payments to

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contractual welfare and pension funds on behalf of an employee who had been suspended for failure to pay a fine imposed for dual unionism; in NLRB v. Eclipse Lumber Co., 199 F.2d 684, 31 LRRM 2065 (9th Cir. 1952), the Court held that employer violated 8(a)(3)(B) when it discharged an employee for failure to pay past union dues which had accrued prior to valid union shop agreement; in Union Starch & Refining Co. v. NLRB, 188 F. 2d 1008, 27 LRRM 2342 (7th Cir. 1951), the Court held that discharge under a valid union shop agreement violated 8(b)(2), 8(b)(1)(A), and 8(a)(3) where membership was denied solely because of the failure to attend union meeting and take loyalty oath to the union; and in Radio Officers Union v. NLRB (A.H. Bull Steamship Co.) 347 U.S. 17 (1954), the Supreme Court held, in part, as follows:

> ". . . Lengthy legislative debate preceeded the 1947 amendment to the Act. . . This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees . . . No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing is condoned." (347 U.S. at 40-41) (Emphasis supplied).

Of course, not every impact on employment violates the Act. For example, a Union Committeeman was removed by the union as Committeeman, his membership in the union being unaffected. As Committeeman he had had superseniority which he lost when removed as Committeeman. Subsequently, there was a layoff and he was laid off, together with other employees, in order of seniority. Had he had superseniority as a Committeeman he would not have been laid off. The General Counsel refused to issue a complaint. Administrative Ruling Case No. F-1015, April 2, 1959, 44 LRRM 1576.

Section 19(c) of Executive Order 11491, as amended,[8/] like § 16(c) of the Statute, first provided that membership could be denied only for failure to meet reasonable occupational standards uniformly required or for failure to tender initiation fees and dues and then stated that that paragraph did not preclude a labor organization from enforcing discipline in accordance with its constitution or bylaws which conform to the requirements of the Order; and the Assistant Secretary made it clear that

---

8/ "(c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order." (Executive Order 11491, as amended, Section 19(c)).

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a labor organization could impose discipline, including expulsion, for reasons other than the failure to pay dues. Thus, he stated, for example:

> "In my view, a labor organization may, pursuant to Section 19(c) of the Order, subject its members to discipline, including, in appropriate cases, expulsion, to protect its continued existence, if such discipline is meted out in accordance with procedures under the labor organization's constitution or by-laws which conform to the requirements of the Order." (American Federation of Government Employees, Local 987, supra, 4 A/SLMR at 511, n. 5) (Emphasis supplied).

Congress, in enacting § 16(c) of the Statute, made violation of 16(c) an unfair labor practice ("Similar language contained in section 19(c) of the Executive Order has been interpreted as an unfair labor practice provision." (S. Rep. 95-969, p. 106; Legislative History, p. 766); but stated that,

> ". . . The subsection does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution and bylaws as long as such action is consistent with the requirements of this chapter." (S. Rep. 95-969, p. 106; Legislative History, p. 766).

The long history of the proviso to Section 8(b)(1)(A) of the NLRA; the conscious inclusion of substantially like language in Section 19(c) of Executive Order 11491; the interpretation and application of the concluding sentence of 19(c) by the Assistant Secretary in a manner wholly consistent with the proviso to 8(b)(1)(A) of the NLRA; and the clear Congressional intent that the concluding sentence of § 16(c) of the Statute reserved to labor organizations their long recognized right to enforce discipline in accordance with procedures under their constitution or bylaws "to the extent consistent with the provisions of this chapter," which, inter alia, includes the provisions of § 20 of the Statute, "Standards of conduct for labor organizations," leaves no doubt that a labor organization may impose discipline, including expulsion, for reasons other than the failure to tender dues, when internal affairs of the union plainly are involved.

B. Exclusive Jurisdiction of the Assistant Secretary Under § 20.

Pursuant to § 20 of the Statute, the Assistant Secretary of Labor for Labor Management Relations has exclusive jurisdiction over Standards of Conduct, including safeguards against improper disciplinary actions and proceedings for enforcement of standards of conduct, except where the action does not concern an internal union matter but touches a part of the public domain covered by the Statute. See, National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, 391 U.S. 418 (1966); National Treasury Employees Union and National Treasury Employees Union, Chapter 53, 6 FLRA No. 37, 6 FLRA 218

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(1981). Thus, in American Federation of Government Employees, Local 2000, AFL-CIO (Mixon), 8 FLRA No. 125, 8 FLRA 718 (1982), the Authority stated, in part, as follows:

> ". . . the matters at issue involve allegations that certain of the Respondent's conduct was inconsistent with and violative of its constitution and bylaws, and thus are matters within the exclusive jurisdiction of the Assistant Secretary of Labor pursuant to the provisions of section 7120 of the Statute" (8 FLRA at 718).

The Authority specifically noted, however, that in National Treasury Employees Union and National Treasury Employees Union, Chapter 53, supra, it had, ". . . found a violation of section 7116(b)(1) of the Statute, and ordered a union steward reinstated to his union position, . . . where it was determined that he would not have been removed except for his having given testimony at an Authority proceeding." (8 FLRA at 718, n. 2).

Where, as here, union discipline is imposed, in whole or in part, because a member has invoked the procedures of the Statute, it does not concern an internal union matter, subject to the exclusive jurisdiction of the Assistant Secretary, but touches a part of the public domain covered by the Statute.9/

C. Imposition of discipline for filing unfair labor practice charges.

It is well settled under the NLRA that, while the proviso to Section 8(b)(1)(A) assures a union freedom of self-regulation when its legitimate internal affairs are concerned, such freedom of self-regulation ceases and

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9/ Nor can it matter that the Assistant Secretary might also remedy the violation. See, for example, 29 C.F.R. § 208.37 which provides:

> "208.37 Prohibition of certain discipline.
>
> "No labor organization or any officer, agent, shop steward, or other representative or any employee thereof shall fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of the Act [the Statute, 29 C.F.R. § 207.19] or this chapter [Title VII of the Civil Service Reform Act of 1978, 29 C.F.R. § 207.1]."

At most, the jurisdiction of the Assistant Secretary over prohibited discipline "for exercising any right . . . under the . . . Act or this chapter" is concurrent with the jurisdiction of the Authority under § 16 of the Statute, but in any event is not exclusive.

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does not apply when discipline is imposed for filing unfair labor practice charges for the reason, as the Board had held and the Supreme Court agreed, ". . . that the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved." NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, 391 U.S. 418, 424 (1968). Cases before the NLRB and the courts to like effect are legion and no purpose would be served in attempting to catalogue them since the rule of law is both clear and settled.10/ See, for example, NLRB v. Teamsters Local 294 (August Bohl Contracting Co.), 470 F. 2d 57, 81 LRRM 2920 (2d Cir. 1972).

The Authority, in National Treasury Employees Union and National Treasury Employees Union, Chapter 53, 6 FLRA No. 37, 6 FLRA 218 (1981), held, in part, that,

> ". . . it is no less interference with the section 7102 statutory right for a union to discipline or discriminate against an employee for giving testimony in an Authority proceeding than it is for an employer to do so as proscribed under section 7116(a)(4) of the Statute. Such interference with employee rights under section 7102 is thus a violation of section 7116(b)(1) of the Statute. However, this should not be construed as abrogating the union's control of its own internal affairs in the absence of a statutory violation such as here involved." (6 FLRA at 218).

Although the decision of the Authority in the Chapter 53 case, supra, directly involved only discipline of a member for giving testimony in an Authority proceeding, it is apparent, and I so conclude, that the Authority's decision applies with equal force to the filing of unfair labor practice charges with the Authority, i.e., that the same overriding public interest which led the Supreme Court, under the substantially similar provision of Section 8(b)(1)(A) of the NLRA, to hold, in Marine Workers, supra, that notwithstanding the proviso to Section 8(b)(1)(A), public interest required unimpeded access to the Board, requires the same

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10/ Although reference is sometimes made more generally to "the Board's processes", see, Local 138, International Union of Operating Engineers, AFL-CIO and Charles S. Skura, 148 NLRB 679, 681 (1964), it is also clear that a union may expel a member for filing a decertification petition with the Board under Section 9 of the NLRA, See, for example, Tawas Tube Products, Inc., 151 NLRB 46, 58 LRRM 1330 (1965); Price v. NLRB, 373 F.2d 443, 64 LRRM 2495 (9th Cir. 1967), cert. denied 392 U.S. 904 (1968); although imposition of a fine for circulation of a petition for decertification violates Section 8(b)(1)(A) because such action is not defensive but, rather, is punishment. NLRB v. Molders, Local 125, 442 F.2d 92, 77 LRRM 2067 (7th Cir. 1971).

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unimpeded access to the Authority except and unless, as the Supreme Court held in Marine Workers, "plainly internal affairs of the union are involved." This is shown by the decision of Judge Sternburg, adopted by the Authority, in which he stated, as to § 16(c), as follows:

> ". . . the proviso . . . [§ 16(c)] with respect to internal union affairs is similar to that contained in Section 8(b)(1)(a) (sic) of the National Labor Relations Act. The National Labor Relations Board, with Court approval, has concluded that while Section 8(b)(1)(a) (sic) assures a union freedom of self regulation where legitimate internal affairs are concerned, such freedom of regulation does not extend to, or encompass, the imposition of penalties for utilizing or participating in the processes of the National Labor Relations Board. . . . [citation of Marine Workers omitted] Accordingly . . . I find that . . . the removal of a union steward for utilizing or participating in the Authority's processes is cognizable under Section 7116(b) of the Statute. . . ." (6 FLRA at 226).

In any event, as Congress intentionally patterned the concluding sentence of § 16(c) after the proviso to Section 8(b)(1)(A) of the NLRA, the decisions of the Board and of the Courts construing the proviso to Section 8(b)(1)(A) are fully applicable to the substantially like provisions of § 16(c) of the Statute.

The charges against Mr. Confer involved, in part, unfair labor practice charges filed by employees other than Mr. Confer (Mr. Confer also filed an unfair labor practice charge) as to which Mr. Confer was alleged to have "handled" (Gatewood and Jordan) and/or to have "persuaded" to be filed (Call); but whether an employee files an unfair labor practice or whether the employee causes another employee to file the unfair labor practice, discipline by a union of a member either, or both, because he has filed an unfair labor practice charge or because he has caused another employee to file an unfair labor practice violates §§ 16(c) and 16(b)(1) of the Statute. cf., Philadelphia Moving Picture Machine Operators' Union, Local No. 307, 159 NLRB 1614, 62 LRRM 1315 (1966), enf'd, 382 F.2d 598, 65 LRRM 3020 (3d Cir. 1967); Local Union No. 204, Sheet Metal Workers' International Association (The Majestic Company), 246 NLRB 318, 102 LRRM 1503 (1979).

General Counsel in his brief (Gen. Counsel Brief, p. 5, n. 4) suggests that Internal Revenue Service, Washington, D.C., 6 FLRA No. 23, 6 FLRA 96 (1981), in which the Authority, following Mt. Healthy City School District

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Board of Education v. Doyle, 429 U.S. 274 (1977),11/ held that ". . . the burden is on the General Counsel to make a prima facie showing that the employee had engaged in protected activity and that this conduct was a motivating factor in agency management's decision not to promote. Once this is established, the agency must show by a preponderance of the evidence that it would have reached the same decision as to the promotion even in the absence of the protected conduct" (6 FLRA at 99), applies to unions. I fully agree. See, American Federation of Government Employees, Local 1920, AFL-CIO, Case No. 6-CO-20012 (OALJ-83-71, March 28, 1983); cf., Overseas Motor, Inc., 260 NLRB 810, 109 LRRM 1225 (1982), enf'd _ F.2d __, 114 LRRM 3447 (6th Cir. 1983). Nevertheless, Internal Revenue Service, supra, is not applicable here for the reasons: a) Respondent has not asserted that it would have disciplined Mr. Confer even if he had not filed, and caused other employees to file, unfair labor practice charges; and b) the General Counsel has affirmatively shown that Mr. Confer was disciplined because he filed, and caused other employees to file, unfair labor practice charges with the Authority. Thus, as General Counsel states, ". . . only unfair labor practices were referenced to the Executive Board by Boykin in seeking authorization to lodge charges against Confer; the charges against Confer are laced with references to Confer's activities in the unfair labor practice arena, and finally, Boykin's tactics at the Trial Board clearly show that it was predominately, if not solely, Confer's resort to the Authority that motivated Respondent . . . the only evidence the Trial Board heard concerned unfair labor practice charges. Thus, Boykin's statement of charges referenced four unfair labor practice charges atributed (sic) to Confer, and the only other documentary evidence before the board consisted of the these same four unfair labor practice charges. The only testimonial evidence heard by the Trial Board was employee Jackson who . . . related his conversations with Call wherein she confessed to Confer's assistance." (General Counsel Brief, pp. 7-8). Accordingly, the burden was on Respondent to show by a preponderance of the evidence that it would have reached the same decision even if, hypothetically, it had not been motivated by a desire to punish Mr. Confer for exercising his protected right to file unfair labor practice charges and Respondent has utterly failed to carry this burden. NLRB v. Transportation Management Corp., ___ U.S. ____, 103 Ct. 2469 (1983).

Respondent's discipline of Mr. Confer, whether by expulsion or by fine, because he filed, or caused other employees to file, unfair labor practice charges with the Authority violated § 16(b)(1) of the Statute. National Treasury Employees Union and National Treasury Employees Union, Chapter 53, supra. Under the circumstances, it is unnecessary to decide,

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11/ Not referred to by the Authority in Internal Revenue Service, supra, but the same principle with respect to the burden of proof was adopted by the National Labor Relations Board in Wright Line, 251 NLRB 1083 (1981), enf'd 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and is frequently referred to as the "Wright Line" rule.

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and, accordingly, no opinion is expressed as to whether such conduct also violates § 16(b)(8) of the Statute.

To remedy the unfair labor practice, Respondent will be ordered to forthwith offer Mr. Confer reinstatement to full membership in the Union. If Mr. Confer accepts reinstatement, he shall, of course, be obligated to tender dues uniformly required as a condition of retaining membership; but he shall not be required to pay any initiation fee as he was a member when unlawfully disciplined on June 24, 1983, for filing, or causing other employees to file, unfair labor practice charges with the Authority; nor shall he liable for any dues which may have accrued from June 24, 1983, to the date he is offered unconditional reinstatement. General Counsel also requests that Respondent "seek a waiver of time for any grievances Confer may have wished to bring during the period when Respondent unlawfully refused his membership." (General Counsel Brief p. 11). This request is denied for the reasons: (a) the record contains no justification for such remedy; and (b) the statute requires that,

> "(b) Any negotiated grievance procedure . . . shall -
>
> . . .
>
> (3) include procedures that -
>
> . . .
>
> (B) assure such an employee the right to present a grievance on the employee's own behalf. . . ." (§21(b)(3)(B)).

Nothing contained in the record shows, or even suggests, that the negotiated grievance procedure does not, pursuant to the Statute, assure employees the right to present grievances on the employee's own behalf. If the agreement so provides, Mr. Confer was not prevented from filing any grievance because he was refused membership in the Union, and in the absence of appropriate grounds shown on the record such relief would be wholly inappropriate.

Having found that Respondent interfered with employee rights under § 2 of the Statute in violation of § 16(b)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to Section 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R §§ 2433.29, the Authority hereby orders that the National Association of Government Employees, Local R5-66, shall:

1. Cease and desist from:

> (a) Interfering with, restraining or coercing its members in the exercise of their rights guaranteed in the Federal Service Labor-Management Relations Statute by expelling, fining, or otherwise

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disciplining a member because he has filed, or has caused other employees to file, unfair labor practice charges with the Authority pursuant to Section 7116 of the Statute.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to carry out the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Forthwith offer to reinstate Mr. James A. Confer, Jr. as a member in good standing of the National Association of Government Employees, Local R5-66 with full rights of membership.

(b) Rescind the decisions of the Trial Board of the National Association of Government Employees, Local R5-66 of June 24, 1983, and of January 5, 1984, with respect to Mr. James A. Confer, Jr.

(c) Accept, if tendered by Mr. James A. Confer, Jr., payment of his dues, from the date of his reinstatement, uniformly required as a condition of retaining membership, either by direct payment by Mr. Confer or by allotment pursuant to § 15(a) of the Statute.

(d) Post at the business office of the National Association of Government Employees, Local R5-66, and in normal meeting places, including all places where notices to members of the National Association of Government Employees, Local R5-66 are customarily posted, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the President of the National Association of Government Employees, Local R5-66, and shall be posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the National Association of Government Employees, Local R5-66 to insure that such notices are not altered, defaced, or covered by any other material.

(e) Submit signed copies of said Notice to the Veterans Administration Medical Center, Memphis, Tennessee, for posting in conspicuous places where members of the National Association of Government

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Employees, Local R5-66 are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(f) Pursuant to § 2423.30 of the Regulations, 5 C.F.R. §2423.30, notify the Regional Director of Region IV, Federal Labor Relations Authority, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, GA 30309, in writing within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 12, 1984
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We hereby notify our members and all employees of the Veterans Administration Medical Center, Memphis, Tennessee that:

WE WILL NOT interfere with, restrain, or coerce our members in the exercise of their rights assured in the Federal Service Labor-Management Relations Statute by expelling, fining, or otherwise disciplining a member because he has filed, or has caused other employees to file, unfair labor practice charges with the Authority pursuant to Section 7116 of the Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL forthwith offer to reinstate Mr. James A. Confer, Jr. as a member in good standing with full rights of membership.

WE WILL rescind the decisions of the Trial Board of the National Association of Government Employees, Local R5-66 of June 24, 1983, and of January 5, 1984, with respect to Mr. James A. Confer, Jr.

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WE WILL accept, if tendered by Mr. James A. Confer, Jr., payment of his dues from the date of his reinstatement, uniformly required as a condition of retaining membership, either by direct payment by Mr. Confer or by allotment pursuant to § 15(a) of the Statute, 5 U.S.C. § 7115(a).

_____
(Labor Organization)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1776 Peachtree Street, NW., Suite 501 - North Wing, Atlanta, GA 30309, and whose telephone number is (404) 257-2324.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE AIR FORCE
ARMAMENT DIVISION, AFSC
EGLIN AIR FORCE BASE, FLORIDA

Respondent

and

Case No. 4-CA-20117

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1817

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and the Respondent filed an opposition to the General Counsel's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-20117 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE DEPARTMENT OF THE AIR FORCE ARMAMENT DIVISION, AFSC EGLIN AIR FORCE BASE, FLORIDA Respondent	
and	Case No. 4-CA-20117
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1897 Charging Party	

Major Wade B. Morrison
For the Respondent

Thomas H. Newberry
For the Charging Party

Regina N. Kane, Esq.
For the General Counsel

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. It was instituted by the Regional Director of the Fourth Region of the Federal Labor Relations Authority by the issuance of a Complaint and Notice of Hearing dated February 23, 1983. The Complaint was issued following an investigation of an unfair labor practice charge filed on December 18, 1981, by American Federation of Government Employees, AFL-CIO, Local 1897, herein referred to as AFGE, Union or Charging Party.

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The Complaint alleges that Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base, herein called Respondent or Employer, has violated sections 7116(a)(1) and (6) of the Statute by refusing to comply with a Decision and Order of the Federal Service Impasses Panel, herein FSIP. Respondent denies any violation of the Statute.

A hearing was held at Eglin Air Force Base, Florida on March 6, 1984, at which the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine, and cross-examine witnesses and argue orally. Briefs filed by Respondent and the General Counsel have been duly considered.

Upon consideration of the entire record in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

1. Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. Douglas M. Johnson is a supervisor and/or a management official within the meaning of section 7103(a)(10) and (11) of the Statute and an agent of Respondent.

2. The Union is a labor organization within the meaning of section 7103(a)(6) of the Statute and, since on or about April 14, 1975, has been and is the exclusive representative of an appropriate unit of employees at Eglin Air Force Base. A collective bargaining agreement signed March 6, 1975 and approved April 14, 1975 had, by its terms (Article 30), a duration of three years from the date it was signed. (G.C. Exh. No. 23). On August 26, 1981, the terms of the agreement were extended until the effective date of any new Memorandum of Agreement (G.C. Exh. No. 2).

3. Air Force Regulations 215-11 (G.C. Exh. No. 3) directs that Noncommissioned Officer's (NCO) Clubs will be membership clubs and that membership checks will be conducted periodically to enforce membership rules. Respondent admits that lax enforcement of this regulation during the noon meal by club management resulted in a practice prior to January 1981, whereby nonmembers were permitted to eat their noon meal at the club.

4. Included among the nonmembers using the club during the noon meal were bargaining unit employees represented by AFGE, the Charging Party herein, as well as employees in another unit represented by National Federation of Federal Employees, Local 1940, herein NFFE.

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5. In January 1981, club management announced that it planned to begin strict enforcement of its membership rules by increasing the frequency of membership checks. In response, NFFE, on January 12, 1981, requested to bargain about the impact and implementation of the change. The following day, the Charging Party, also submitted a similar request to bargain. The Charging Party's proposal was "that the decision to require all eligible Unit Employees to join and pay dues at the NCO and Officers' Clubs for the privilege of using the facility during the lunch hour be suspended until an adequate facility, namely the proposed Base Exchange Restaurant, be completed which will provide Unit Employees an alternative to being forced to become members of said Clubs just to be able to have a suitable place to eat lunch on base" (emphasis supplied). Discussions ensued between management and the unions, with the sticking point being how long management would allow non-members to eat lunch in the clubs without being members or meeting membership criteria (R. Exh. 2-10, G.C. Exh. 5).

6. Following impasse NFFE requested FSIP assistance by letter dated March 9, 1981 (G.C. Exh. 6). By letter dated March 19, 1981, AFGE also requested FSIP assistance (G.C. Exh. 7). AFGE's request for FSIP assistance was virtually identical with that submitted 10 days earlier by NFFE. AFGE advised the Panel in its March 19, 1981 submission that "the dispute is over when the change will be implemented." The "change" was further set forth as being that previously, "unit members had access on base to hot, cafeteria-style noontime meals through the facilities of the Eglin Officers' and Noncommissioned Officers' (NCO) Clubs" and that they were allowed access "without restriction in that employees using these facilities were not required to be either members or bona fide guests of members of these clubs." They further stated that one of their primary concerns was that "many of the unit members of AFGE are not eligible to join the NCO Club because of their GS and WB grade level. For these employees, the change effectively bars them from the noontime service even if they are willing to pay the monthly membership fee" (emphasis supplied) (G.C. Exh. 7). By letter dated April 2, 1981, FSIP directed NFFE and management to submit their respective positions and proposals by April 13, 1981 and their rebuttal briefs by April 20, 1981 (G.C. Exh. 8). NFFE's proposal was that "management reinstate the long standing past practice, recently discontinued, which allowed unit members to eat lunch at the Eglin Noncommissioned Officers' (NCO) Club without condition of membership in the club. Such a club is to remain open and provide adequate feeding facilities to all unit members regardless of their club membership status or eligibility until such time as an adequate appropriated fund cafeteria is made available to our unit members" (G.C. Exh. 9). Additionally, NFFE attached its March 9, 1981 submission as further explanation of its position. As noted above, that document advised FSIP that "the dispute is over when the change will be implemented" and identified the change as no longer permitting bargaining unit employees to eat lunch at the clubs irrespective of their membership status (G.C. Exh. 9). Both parties later

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submitted rebuttal briefs in accordance with FSIP's direction, further arguing the merits of their positions (Resp. Exh. 12 and 13). On April 23, 1981, FSIP notified AFGE and management that their previously submitted statements of position (G.C. Exh. 7 for AFGE; G.C. Exh. 10 for management) would constitute their initial submission and that rebuttal briefs were to be submitted by May 1, 1981. Both parties submitted rebuttal briefs (G.C. Exh. 12 and 13).

7. Thereafter, FSIP joined the two cases and issued a decision on June 9, 1981, ordering that the unions' (plural) proposal be adopted (G.C. Exh. 14). In its decision, FSIP stated that the issue before it was whether implementation of the Employers's decision concerning unit employees' lunchtime use of the NCO Club should be suspended until a new cafeteria was built and in service.[1/] In its decision, FSIP set forth the "parties" proposals as follows:

> Both Unions propose that the decision to close the NCO Club to nonmembers be rescinded and implementation deferred until a new cafeteria has been opened (which is scheduled to take place in October 1982). The Employer proposes that membership requirements remain in effect for both clubs.

In its conclusion, FSIP stated as follows:

> Having considered the arguments and evidence, we conclude that the current eating arrangements, as reflected in the Employer's proposal, are unfair to those employees not eligible to join the NCO Club. In addition, the Employer has not shown any compelling reasons why the past practice must be changed at this time. The Union's proposal, on the other hand, would not preclude the Employer from acting but would merely delay implementation of its decision with regard to NCO Club privileges until the cafeteria is in service. For all of these reasons, the Union's proposal provides a more reasonable basis for the resolution of this dispute.

8. On July 10, 1981, management sent a letter to each union specifying how it intended to comply with FSIP's order (G.C. Exh. 15, Resp. Exh. 11). Specifically, the Respondent proposed to grant temporary civilian membership privileges to any member of the Union's bargaining unit who was not currently eligible for membership (grades GS-10 or equivalent and above). Further, Respondent proposed that each individual who applied for temporary membership would be issued an identification card and would be assured the normal membership fee of four dollars per month. NFFE concurred with the proposed action (Resp. Exh. 11), while

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1/ The parties stipulated at the hearing that the cafeteria contemplated in FSIP's decision has been built and is in service.

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AFGE rejected it (G.C. Exh. 16). On July 22, 1981, management asked FSIP to clarify its Decision and Order (G.C. Exh. 17). By supplemental decision dated September 18, 1981, FSIP stated that management's proposed action did not comply with its earlier decision (G.C. Exh. 19). FSIP also advised the Respondent that "unless the parties agree otherwise -- as the Employer and Local 1940 have done -- the specific language of the Panel's Order is binding on the parties during the term of the agreement pursuant to Section 7119(c)(5)(c) of the . . . Statute . . . ."

9. By letter dated October 22, 1981, management advised AFGE that it intended to comply with FSIP's Order by waiving its NCO Club membership eligibility and dues requirements for the noon meal until the Base Exchange cafeteria opened. It further proposed to issue "lunch cards" to facilitate entry of non-members eligible to eat lunch pursuant to FSIP's Order. A one-time administrative fee of $1.00 was to be charged for the lunch card (G.C. Exh. 20). By letter dated October 26, 1981, AFGE advised management that its proposed action was unacceptable in that "it imposes changes in the Past Practice" and it failed to provide for three separate notices in the Eglin Bulletin (G.C. Exh. 21). Neither party sought a determination from FSIP as to whether Respondent's proposal constituted compliance. However, on November 18, 1981, Respondent notified the union that it was dropping the $1.00 administrative fee requirement and would publish the notice in three issues of the Eglin Bulletin (G.C. Exh. 22). The lunch passes (Resp. Exh. 14(b)) were issued to AFGE employees as they entered the NCO Club for lunch, or were issued during business hours in the Club's administrative office. They were issued for an indefinite period and were used to facilitate identification of those entitled to eat lunch at the NCO Club pursuant to FSIP's Order. Issuance of the passes usually took less than a minute. No administrative fee was ever charged for one of these passes.

Discussion and Conclusions of Law

Section 7116(a)(1) of the Statute makes it an unfair labor practice for an agency to "interfere with, restrain, or coerce" any employee in the exercise of that employee's rights under that Statute. Section 7116(a)(6) makes it an unfair labor practice for any agency to fail or refuse to cooperate in impasse procedures and decisions of the FSIP. It is well established that a refusal to comply with a final order of the FSIP constitutes a violation of Sections 7116(a)(1) and (6) of the Statute. Michigan Army National Guard, Lansing, Michigan, 11 FLRA No. 4 (1983); Florida National Guard, 9 FLRA No. 41 (1982); National Guard Bureau, Marine Air National Guard, Augusta, Maine, 10 FLRA No. 101 (1982).

The FSIP Decision and Order which is the subject of this controversy was dated June 19, 1981. As noted above, FSIP ordered Respondent to adopt the Union proposal which FSIP itself characterized as follows: ". . . that the decision to close the NCO Club to nonmembers be rescinded and

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implementation be deferred until a new cafeteria has been opened . . . ." (emphasis mine). My review of the FSIP decision and record upon which it was based[2/] leads me to conclude that the focus of FSIP's concern was the fact that Respondent's proposed change would effectively bar some AFGE (and NFFE) unit members from eating at the NCO Club as in the past. Thus, FSIP specifically noted that the Employer's proposal was "unfair to those employees not eligible to join the NCO Club" (emphasis mine). I find nothing in FSIP's decision to indicate any concern -- one way or the other -- with the right of Respondent to enforce its regulations with respect to persons other than AFGE (and NFFE) unit members who were being adversely affected by the decision to institute more frequent membership checks and thereby exclude nonmembers. With a record showing that a new cafeteria was scheduled for completion in October 1982, about 16 months later, FSIP simply observed no compelling reason for Respondent to change its "past practice." FSIP's unfortunate use of the term "past practice" has apparently caused the General Counsel to misinterpret FSIP's decision as requiring Respondent not to change the statuts quo as existed prior thereto. Thus, the General Counsel contends that Respondent "went beyond the parameters of the June 9, 1981 FSIP Decision and Order, as clarified on September 18, 1981, by imposing conditions other than what has been the established past practice . . . ." Further, the General Counsel contends that the issuance of yellow cards or lunch passes to AFGE unit members does not by any "stretch of the imagination" constitute compliance with the "strict terms" of FSIP's decision.

I do not interpret FSIP's decision in the same manner as the General Counsel. I conclude that FSIP's use of the term "past practice" was only intended to refer to the practice of not enforcing the requirement of membership. The vice of Respondent's original proposed compliance was that it was requiring temporary membership, in contrast to the past, and

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2/ In my opinion, I need only review the same record FSIP had before it so that I can decide what FSIP intended by its decision which I am being asked to interpret. I do not believe it is necessary for me, in the circumstances of this case, to go outside that record in order to determine what the past practice was prior to the dispute which went to FSIP for decision. For this reason, I believe that all I need to know is what FSIP thought the past practice was on the basis of the submissions of the parties to FSIP. Accordingly, the testimony of General Counsel's witnesses as to "past practice" was irrelevant; a hearing was not necessary; and this record should have been stipulated, either to me or directly to the Authority. The testimony of General Counsel's witnesses was not only irrelevant, but it was not helpful in resolving the issues posed herein.

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and even though eligibility requirements were waived. I believe this is why FSIP rejected Respondent's proposal. Respondent's second proposed compliance involving a $1.00 administrative fee was rejected by AFGE, not implemented by Respondent, not appealed to FSIP, and not specifically referred to in the charge or the complaint. In these circumstances, I find it unnecessary to speculate on whether imposition of $1.00 administrative fee, even if implemented by Respondent, would have constituted compliance.[3/] Respondent's third proposal -- the only one really implemented for all practical purposes -- was the issuance of yellow cards or lunch passes, which cost nothing. While it is true that these were not required before, I do not find that this requirement was barred by FSIP's decisions. To conclude that FSIP intended to bar any change, especially one as trivial as this one, is to read too much into FSIP's decisions. To also conclude that FSIP intended to bar the Respondent from enforcing its regulations vis-a-vis persons other than AFGE unit employees, is too presume that FSIP's jurisdiction over the instant dispute extends to the conditions of employment of persons who are not members of AFGE's appropriate unit (See Resp. brief pp. 9-11). In the circumstances of this case, I am reluctant to conclude that compliance with FSIP's decision required Respondent to do anything more than rescind their proposed decision requiring membership in the NCO Club and continue to permit AFGE unit members to use the Club at the noon meal, until the new cafeteria was completed. The issuance of yellow lunch cards does not constitute a "restriction", as suggested by the General Counsel, because it neither prevents an AFGE unit member from eating at the Club nor does it result in any out-of-pocket costs.[4/] Rather, the issuance of yellow cards or passes to AFGE unit members merely served as a simple and

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[3/] Respondent's first and second proposed compliance were not alleged in the charge but even if they were so alleged, I would find that neither were implemented after their rejection by AFGE. Moreover, FSIP itself already ruled on the first proposal when it issued its clarification decision -- a decision which was obviously necessary.

[4/] The General Counsel has not established by a preponderance of the evidence that the Union ever proposed to Respondent, as alleged in paragraph 7(d) of the complaint "in substance that the past practice of permitting unlimited and unrestricted access to the noncommissioned officers' club without the use of passes or imposition of fees be continued until the completion of the construction of a Base Exchange restaurant."

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expeditious method of identifying them as persons who are permitted to eat at the club notwithstanding their nonmembership. As a result, only persons with membership cards or yellow lunch cards could eat at the club and all others could be excluded. I find that this was a reasonable accommodation on Respondent's part and constituted compliance with FSIP's decision.[5/] Accordingly, I do not find a violation of Section 7116(a)(1) and (6) of the Statute and it is recommended that the Authority issue the following:

ORDER

That the Complaint in Case No. 4-CA-20117 be, and it hereby is, dismissed.[6/]

Francis E Dowd

FRANCIS E. DOWD
Administrative Law Judge

Dated: July 12, 1984
Washington, D.C.

[5/] In view of my decision in this basis, I find it unnecessary to pass upon Respondent's other defense that FSIP's decision is only binding on the parties during the term of a collective bargaining agreement unless the parties agree otherwise. The parties stipulated that there was no agreement in force at the time FSIP issued its decision, there being a hiatus between the expiration date of March 6, 1981 and a Memorandum of Agreement dated August 26, 1981.

[6/] I am constrained to note that the Union could itself have sought clarification from FSIP on the issue of the yellow lunch passes instead of choosing to litigate as an unfair labor practice what essentially is a matter of interpretation. A more simple and expeditious route would have been to ask FSIP to clarify its own decision. In my opinion, the Union's resort to the unfair labor practice procedure of the Statute was premature and the General Counsel should have held the charge in obeyance until FSIP had an opportunity to interpret its own decision. See Chief Judge John H. Fenton's discussion of this issue in Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA No. 95, 13 FLRA 571, a decision adopted by the Authority on January 6, 1984.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1980, AFL-CIO

Union

and

Case No. 0-NG-724

U.S. DEPARTMENT OF
AGRICULTURE, FARMERS
HOME ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents issues concerning the negotiability of the following Union proposal:

> When undergoing a major reduction-in-force, the State Director will request the National Office of Farmers Home Administration to request early retirement authorization from the Office of Personnel Management, in accordance with Public Law 95-454, Section 306. Performance appraisals of employees in the reduction-in-force competitive area will have their appraisals frozen when a decision is made to implement a reduction-in-force. [Only the underlined portion of the proposal is in dispute.]

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations. The proposal, on its face, would require the Agency to freeze bargaining unit employees' performance appraisals at the time a decision is made to implement a reduction-in-force (RIF). The Agency has refused to bargain over the disputed proposal contending that the proposal is inconsistent with the Federal Personnel Manual (FPM), chapter 351, subchapter 2-6a(1), a Government-wide regulation, and, thus, is outside the duty to

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bargain.1/ The Union in essence argues that the proposal is not inconsistent with the FPM since the proposal is not incompatible or irreconcilable with that regulation, but, instead, is negotiable as a procedure management will observe in the exercise of its right to implement a RIF.

In agreement with the Agency, the Authority finds that the disputed proposal herein is inconsistent with chapter 351, subchapter 2-6a(1) of the FPM and, thus, is outside the duty to bargain under section 7117(a)(1) of the Statute.2/ The cited provision of the FPM provides that an employee's current official performance appraisal on the date of issuance of a specific reduction-in-force notice is the appraisal that determines his or her retention standing in the event that a RIF occurs. The Union's proposal, however, would require the Agency, in effect, to consider for retention purposes the official performance appraisal of an employee on record on the date on which the decision is made to institute a RIF. It does not appear that in all circumstances, especially where a significant number of employees are involved, an agency's decision to implement a RIF and specific notice to employees could be accomplished

1/ Chapter 351, subchapter 2-6a(1) of the FPM states as follows:

2-6. EFFECTIVE DATE OF PERFORMANCE APPRAISAL

a. Appraisals frozen on date of notice.

(1) Except for employees covered under 2-6a (3) below, an employee's current official performance appraisal on the date of issuance of a specific reduction-in-force notice is the appraisal that determines his or her retention standing under paragraph 2-9 of this chapter. Performance appraisals that were due on or before the date of issuance of notice but were not officially approved and put on record until after the date of issuance of notice do not affect determination of the employee's retention standing.

2/ Section 7117(a)(1) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

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simultaneously, as argued by the Union.3/ Thus, since a decision to implement a RIF would not necessarily coincide with specific notice to an individual employee selected for release from his or her competitive level, the Union's proposal would require the Agency to freeze performance appraisals at a time different from that which is required by the FPM. For this reason, the proposal is inconsistent with the FPM, contrary to the Union's claim.

The Authority further concludes that the FPM provision at issue herein is a Government-wide regulation. The Office of Personnel Management (OPM) is statutorily empowered to prescribe regulations for the release of employees in a reduction-in-force which give due effect to length of service and performance ratings (5 USC § 3502).4/ The requirements as to the date performance appraisals are frozen as set forth in the FPM constitute OPM's determination of the policies necessary to give due effect to performance ratings. Moreover, section 351.204 of part 351 of title 5, Code of Federal Regulations (CFR), requires each agency to follow and apply the regulations prescribed therein when the agency determines that a RIF is necessary. In addition, section 351.205 further authorizes the Office of Personnel Management to establish "further guidance and instructions for the planning, preparation,

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3/ See provisions governing implementation of a RIF contained in 5 CFR Part 351 and FPM Chapter 351.

4/ The pertinent parts of 5 USC § 3502 provide as follows:

> § 3502. Order of retention
>
> (a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to--
>
> (1) tenure of employment;
> (2) military preference, subject to section 3501(a)(3) of this title;
> (3) length of service; and
> (4) efficiency or performance ratings.
>
> . . . . . .
>
> (c) An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other competing employees.

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conduct, and review of reduction-in-force through the Federal Personnel Manual system."5/ The requirements for determination of the effective date of employees' performance appraisals, as mentioned above, are set forth in chapter 351 of the FPM and are applicable to Federal civilian employees in the competitive service within the executive branch of the Government. As such, the applicable FPM provision, is generally applicable to the Federal civilian work force and is "Government-wide" with the meaning of section 7117(a)(1) of the Statute. See American Federation of Government Employees, AFL-CIO and Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 11 FLRA 238 (1983) (Union Proposal 6); National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowery Air Force Base, Colorado, 9 FLRA 151 (1982); National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980). Insofar as the Union's proposal is inconsistent with the applicable provision of the FPM, it is outside the duty to bargain under section 7117(a)(1) of the Statute.6/

As to the Union's assertion that the proposal is negotiable because it is a procedure which management will observe in the exercise of its

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5/ Sections 351.204 and 351.205 of title 5 of the Code of Federal Regulations states as follows:

> § 351.204 Responsibility of agency.
>
> Each agency covered by this part is responsible for following and applying the regulations in this part when the agency determines that a reduction in force is necessary.
>
> § 351.205 Authority of OPM.
>
> The Office of Personnel Management may establish further guidance and instructions for the planning, preparation, conduct, and review of reductions in force through the Federal Personnel Manual system. OPM may examine an agency's preparations for reduction in force at any stage. When OPM finds that an agency's preparations are contrary to the express provisions or to the spirit and intent of these regulations or that they would result in violation of employee rights or equities, OPM may require appropriate corrective action.

6/ Since the Authority concludes that the disputed proposal is outside the duty to bargain under section 7117(a)(1), it is unnecessary to consider the Agency's additional contention concerning the nonnegotiability of the proposal.

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right to implement a RIF, it cannot be sustained under the circumstances. Under the Statute, the duty of an agency to negotiate with a union extends to the conditions of employment affecting bargaining unit employees except as provided otherwise by Federal law and Government-wide rule or regulations. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747 (1980). Therefore, a proposal is outside the duty to bargain to the extent that it is inconsistent with any Federal law or Government-wide rule or regulation, irrespective of whether the proposal is procedural in nature. Insofar as the Authority finds the proposal herein is inconsistent with a Government-wide regulation, the proposal is outside the duty to bargain under section 7117(a)(1) of the Statute.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

and

SOCIAL SECURITY ADMINISTRATION
REGION VII, CLAYTON DISTRICT,
CLAYTON, MISSOURI

Respondents

and

Case No. 7-CA-30271

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2916

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts, accompanying exhibits, and the parties' contentions,[1/] the Authority finds:

The complaint alleges that the Social Security Administration, Baltimore, Maryland and Social Security Administration, Region VII, Clayton District, Clayton, Missouri (the Respondents) violated

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1/ The General Counsel moved to strike several documents, and arguments in the Respondents' brief predicated thereon, because factual material relied upon by the Respondents was not included in the stipulation. In reaching its decision in the instant case, the Authority has, of course, considered only facts contained in the stipulation, and therefore the motion is denied.

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section 7116(a)(1), (5) and (8) of the Statute[2/] by refusing to furnish information requested under section 7114(b)(4) of the Statute[3/] to the American Federation of Government Employees, AFL-CIO, Local 2916 (the Union) pertaining to the performance ratings of certain employees in the Clayton District which is necessary to process a grievance filed by the Union.

2/ Section 7116(a)(1), (5) and (8) of the Statute provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

. . . . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

3/ Section 7114(b)(4) of the Statute provides:

§ 7114. Representation rights and duties

. . . . . .

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

. . . . . .

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(Continued)

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The stipulated facts show that the Union filed a grievance alleging, among other things, that October, 1982 performance appraisal ratings for employees in one of the offices in the Clayton District were uniformly higher than those for bargaining unit employees in other offices in that District, and that the disparities were not justified by the actual performance of the employees. In order to support this grievance, the Union requested copies of the audits of the approximately 20 employees who received the highest ratings on the performance appraisals, all of whom were located in the same office within the Clayton District as mentioned above. The audits quantify tasks that employees perform relating to the job elements used in appraising their performance. The parties stipulated further that the audits would show whether the performance of employees receiving the highest ratings on their appraisals were significantly different from the performance of other employees within the Clayton District, and that this information would support or refute the claims alleged by the Union in its grievance. Upon receiving the Union's request for the audits, the Respondents refused to furnish the information.

The issue before the Authority is whether the audits were reasonably available and necessary for the Union to perform its representational function within the meaning of section 7114(b)(4) of the Statute. The General Counsel contends that the information was necessary because it would have supported an allegation made by the Union in its grievance that various employees in the Clayton District performing the same caliber of work received different performance ratings and, therefore, the Union could have determined whether to pursue the grievance. The Respondents assert that the information was not necessary, and that the Union's request was too broad and unduly burdensome.

It is concluded that the information sought here is necessary within the meaning of section 7114(b)(4) of the Statute. Thus, as stipulated by the parties, the audits would have allowed the Union to determine whether the performance of employees in one particular office within the Clayton District was superior to the performance of employees in other offices within that District who performed comparable work but received different performance ratings, and therefore to determine whether to pursue the

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(Continued)

> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

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grievance. See United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA No. 16 (1984); Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA 654 (1982). Further, contrary to the Respondents' contention, the Authority concludes that the record demonstrates the information sought was reasonably available within the meaning of section 7114(b)(4) of the Statute, was sufficiently specific to be identified, could have been furnished to the Union without creating an undue burden on the Respondents, and would be sanitized to protect employee rights under the Privacy Act.4/

Having concluded that the Respondents refused to furnish information which is reasonably available and necessary within the meaning of section 7114(b)(4) of the Statute, the Authority finds that the Respondents violated section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Social Security Administration, Baltimore, Maryland and the Social Security Administration, Region VII, Clayton District, Clayton, Missouri shall:

1. Cease and desist from:

(a) Refusing to provide the American Federation of Government Employees, AFL-CIO, Local 2916, the employees' exclusive representative, with all requested data reasonably available and necessary for it to properly perform its representational function regarding its grievance concerning the disparity in performance appraisal ratings of employees in the Social Security Administration, Region VII, Clayton District, Clayton, Missouri.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, provide the American Federation of Government Employees, AFL-CIO, Local 2916, the employees' exclusive representative, all requested data reasonably available and necessary for it to properly

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4/ Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 USC § 552a (1982)).

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perform its representational function regarding its grievance concerning the disparity in performance appraisal ratings of employees in the Social Security Administration, Region VII, Clayton District, Clayton, Missouri.

(b) Post at its facilities at the Social Security Administration, Region VII, Clayton District, Clayton, Missouri copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official of the Social Security Administration, Region VII, Clayton District, Clayton, Missouri, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to provide the American Federation of Government Employees, AFL-CIO, Local 2916, our employees' exclusive representative, all requested data reasonably available and necessary for it to properly perform its representational function regarding the grievance concerning the disparity in performance appraisal ratings of employees in the Social Security Administration, Region VII, Clayton District, Clayton, Missouri.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, provide the American Federation of Government Employees, AFL-CIO, Local 2916, our employees' exclusive representative, all requested data reasonably available and necessary for it to properly perform its representational function regarding the grievance concerning the disparity in performance appraisal ratings of employees in the Social Security Administration, Region VII, Clayton District, Clayton, Missouri.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. CUSTOMS SERVICE, REGION I
BOSTON, MASSACHUSETTS

Respondent

and

Case No. 1-CA-30181

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 133

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent, U.S. Customs Service, Region I, Boston, Massachusetts, had engaged in the unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions with respect to the Judge's Decision and the General Counsel filed an opposition.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

In agreement with the Judge, the Authority finds that the Respondent violated section 7116(a)(1) and (5) of the Statute[1/] when it unilaterally increased the number of screeners per shift and enlarged the duties

1/ Section 7116(a)(1) and (5) of the Statute provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(Continued)

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of the position of screener[2/] to include the active search for prime narcotics suspects without affording the exclusive representative, National Treasury Employees Union and NTEU Chapter 133 (NTEU), prior notice and thereafter rejected NTEU's request to bargain concerning the impact and implementation of the change. In so finding, the Authority emphasizes that where an agency in exercising a management right under section 7106 of the Statute changes conditions of employment of unit employees, there exists a statutory duty to negotiate if such change results in more than a de minimis impact upon unit employees or such impact is reasonably foreseeable. See U.S. Government Printing Office, 13 FLRA 203 (1983) and Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174 (1984).

However, the Authority finds that the Judge's recommended status quo ante remedy is not warranted. Thus, balancing the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy, and taking into consideration the various factors set forth in Federal Correctional Institution, 8 FLRA 604 (1982), the Authority concludes that such remedy would not effectuate the purposes and policies of the Statute. In this regard, the Authority concludes that while no notice of the foregoing changes was given to NTEU, the Respondent's refusal to bargain with NTEU as requested concerning a change in the number of screener positions to be assigned per shift was not willful in nature, but instead was based upon the Respondent's good faith but erroneous belief that there had been

(Continued)

> (a) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

2/ The Authority adopts the Judge's finding that the complaint, alleging a violation by the Respondent's unilateral change in the number of inspectors assigned to screener and primary inspector positions without giving the Union the opportunity to bargain on impact and implementation, encompassed the change in duties of the screeners. Thus, as found by the Judge, and supported by the record, the change in the number of screeners was integrally related to the change in duties, as both were part of a plan to increase narcotics seizures in the Boston area. Moreover, the matter was fully litigated at the hearing, without objection by the Respondent.

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no change in preexisting practice with respect to determining such numbers and that NTEU's bargaining request did not extend to the additional duties to be performed by such screeners. Indeed, the record demonstrates that supervisory customs inspectors work under an established and published schedule which sets forth a numerical ratio of customs inspectors to incoming passengers and that this practice was unaffected by the Respondent's decision to increase the number of screeners within this predetermined ratio. The record also indicates that supervisory customs inspectors historically determine, on a unilateral basis, which of the four possible duty assignments any particular customs inspector will perform on any given shift, further substantiating that the Respondent's belief that there had been no change in preexisting practice was in good faith.

Moreover, the record establishes that the changes in both the number and duties of the screeners were announced subsequent to a meeting attended by one of the Respondent's supervisory officials at customs headquarters in Washington, D.C., where the Respondent was informed that the headquarters office was not satisfied with the number of narcotics seizures being made in the Boston area. In addition, the record shows that in November 1982, four months prior to the changes herein, the Respondent sponsored a training course on observational techniques held by inspectors from the headquarters office, the purpose of which was to increase the number of narcotics seizures. Clearly, the change in duties of the screeners was but one part of a comprehensive nationwide effort to increase narcotics seizures which had previously been announced by President Reagan at the highest level of the Federal government.3/ The Authority recognizes the significance of this nationwide effort to increase narcotics seizures and concludes that this important stated policy objective is likely to be disrupted and impaired by a return to the status quo ante. See, e.g., Department of the Treasury, Internal Revenue Service, Jacksonville, Florida, 15 FLRA No. 187 (1984). See also Federal Aviation Administration, Washington, D.C., 17 FLRA No. 26 (1985).

Finally, the Judge found that the foreseeable impact of the Respondent's action upon bargaining unit employees would occur by diminishing the future opportunities of primary customs inspectors in achieving acceptable yearly performance appraisals, and hence their future career development and opportunities. The Authority notes in this regard that a prospective bargaining order would provide the parties an opportunity to address any concerns about the future career development and opportunities of primary customs inspectors, and concludes that an order requiring the

3/ See, e.g., President Reagan's "Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions," where he noted the importance of mobilizing "all our forces to stop the flow of drugs into this country. . . ." Public Papers of the Presidents, Ronald Reagan, 1982, Vol. I, p. 813 (June 24, 1982).

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Respondent to bargain with NTEU upon request concerning such foreseeable future impact will provide a meaningful remedy for the violation found to have been committed and will fully effectuate the purposes and policies of the Statute. Therefore, the Judge's recommended Order shall be modified accordingly.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the U.S. Customs Service, Region I, Boston, Massachusetts shall:

1. Cease and desist from:

(a) Changing the number of screeners assigned to any given shift and changing the assigned duties of the customs inspectors serving in screener positions, without first giving the National Treasury Employees Union and NTEU Chapter 133, the exclusive representative of its employees, prior notice of the change and the opportunity to negotiate on the impact and the manner of implementation of such change.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights accorded them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Upon request, negotiate with National Treasury Employees Union and NTEU Chapter 133 on the impact and implementation of any changes in both the number of screeners assigned per shift and the duties assigned customs inspectors serving as screeners.

(b) Notify the National Treasury Employees Union and NTEU Chapter 133 prior to effecting any further changes in both the number of screeners assigned per shift and the duties assigned customs inspectors serving as screeners, and upon request bargain concerning the impact and implementation of such changes.

(c) Post at the Logan International Airport, Boston, Massachusetts copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official of the U.S. Customs Service, Region I, Boston, Massachusetts, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where Notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

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(d) Notify the Regional Director for Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the number of screeners assigned to any given shift and change the assigned duties of customs inspectors serving in screener positions without first giving the National Treasury Employees Union and NTEU Chapter 133, the exclusive representative of our employees, prior notice of the change and the opportunity to negotiate on the impact and implementation of such changes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Treasury Employees Union and NTEU Chapter 133 prior to effecting any future changes in both the number of screeners assigned per shift and the duties assigned customs inspectors serving as screeners and, upon request, negotiate on the impact and implementation of any such changes.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116, and whose telephone number is: (617) 223-0920.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

U.S. CUSTOMS SERVICE, REGION I (Boston, Massachusetts)	
Respondent	
and	Case No.: 1-CA-30181
NATIONAL TREASURY EMPLOYEES UNION	
Charging Party	

Mr. William P. Milton
For the Charging Party

Carol Waller Pope, Esquire
For the General Counsel

Dennis J. Cronin, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on April 22, 1983, by the National Treasury Employees Union, (hereinafter called the Union or NTEU), a Complaint and Notice of Hearing was issued on June 23, 1983, by the Regional Director for Region I, Federal Labor Relations Authority, Boston, Massachusetts. The Complaint, which was amended at the hearing, alleges that the U.S. Customs Service, Region I, Boston, Massachusetts, (hereinafter called the Respondent or Customs Service), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations

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Statute, (hereinafter called the Statute), by virtue of its action in unilaterally changing the percentage and/or number of inspectors assigned to "screener" and "primary inspector" positions on any given shift without first giving the Union notice of the change and an opportunity to bargain with respect to the impact and the manner of implementation of the change.

A hearing was held in the captioned matter on September 26, 1983, in Boston, Massachusetts. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel, Respondent and Charging Party submitted post-hearing briefs which to the extent they are responsive to the allegations of the Complaint, have been duly considered.[1/]

Findings of Fact

The Union, with certain named exceptions, is the certified collective bargaining representative of all Respondent's non-professional employees, including, among others, the approximately fifty-three Customs Inspectors employed in the Port of Boston of Region I. The Customs Inspectors are assigned on a rotational basis to duty stations located at Logan Airport and various seaports within the jurisdiction of Region I. When assigned to Logan Airport the Customs Inspectors perform the following duties: primary inspector, secondary inspector, screener or coordinator. Assignments to the aforementioned duties are made on a daily basis by Supervisory Customs Inspectors.

When assigned to the position of primary inspector, the Customs Inspector works at one of the twenty modular conveyer belt stations equipped with a Treasury Enforcement Communication Systems Computer (TECS). In performance of his duties as a primary inspector the Customs Inspector examines the hand-carried luggage of the arriving international passengers and reviews their respective passports and declarations. Additionally, the primary inspector elicits certain information from the deplaning passengers and inputs same into the TECS system. Thereafter, if the primary inspector determines that a further examination of the passenger and/or his baggage is not warranted, the passenger is cleared and allowed to leave the terminal. However, if the primary inspector determines that a further investigation or examination of the passenger is in order he may take the passenger to the rear of the inspection module or to a private room for a more thorough examination. There is no limit on the amount of time the primary inspector is allowed to spend on the optional secondary thorough passenger examination.

1/ In the absence of any objection, the General Counsel's motion to correct the transcript is hereby granted.

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When assigned to the position of secondary inspector the Customs Inspector works at the end of the modular conveyer belt behind the primary inspector and primarily acts as a backup to the primary inspector in that he is available to take over the primary inspector's position in the event that the primary inspector has to leave the forward position on the conveyer belt for purposes of conducting a more thorough inspection of a deplaning passenger's luggage. Given the configuration of the inspection station, up to ten Customs Inspectors can be assigned to the position of secondary inspector at any given time.

When assigned to the position of coordinator the Customs Inspector is responsible for assigning arriving flights a specific gate position and luggage carousel.

When assigned to the position of screener, the position here in dispute, the Customs Inspector was prior to March 17, 1983, charged with the responsibility of facilitating the flow of passengers, answering questions and clearing passengers requiring special attention. This latter group of passengers includes the elderly, unaccompanied minors and handicapped individuals.

Assignment of Customs Inspectors to incoming flight is predicated upon the number of passengers arriving at the airport within a 30-minute period. Thus, according to the record evidence, the ratio of Customs Inspectors to incoming passengers is to be no less that 30 to 1, i.e. one Customs Inspector to be assigned for every 30 arriving passengers. The record further establishes that the Supervisory Customs Inspectors work under an established and published schedule which sets forth a numerical ratio of Customs Inspectors per total amount of "incoming passengers and crew on flights with an ETA within a 30-minute period." According to the schedule, the 30 to 1 ratio of Customs Inspectors to arriving passengers holds constant until such time as the amount of incoming passengers exceeds 240 passengers, thereafter one additional Customs Inspector is always added to the 30 to 1 ratio.[2/] The record also establishes that the Supervisory Customs Inspectors historically determine, on a unilateral basis, which of the four duties, i.e. primary inspector, secondary inspector, coordinator, or screener, any particular Customs Inspector will perform on any given shift he is assigned to.

In making the assignments to the various positions, the Supervisory Customs Inspector, other than insuring that the 30 to 1 ratio of Customs Inspectors to passengers is maintained, are under no restrictions whatsoever with respect to the number of Customs Inspectors to be

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2/ The published schedule indicates, for example, that when the arriving planes have between 271-300 passengers there must be eleven Customs Inspectors assigned to the shift.

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assigned to the various positions. Thus, the Supervisory Customs Inspector may in his discretion not assign any Customs Inspector to the position of screener on any given shift. Additionally there appears to be no set ratio with respect to the number of Customs Inspectors assigned to the primary and secondary positions on the belts. In this latter connection the record evidence indicates that there have been times when no Customs Inspectors were assigned to the positions of screener or secondary inspector on a particular shift. At other times there were only two secondary inspectors assigned to back up eighteen primary inspectors. On another day ten Customs Inspectors were assigned to the position of secondary inspectors behind twenty primary inspectors.

With respect to the yearly performance appraisals of the Customs Inspectors, the record indicates that one of the elements considered in such appraisals is the number of narcotic seizures made by the Customs Inspectors.

According to the testimony of Union President Pacewicz, Mr. Stephan Emmanuel and Mr. Lawrence Byrd, all of whom are Customs Inspectors who have worked one time or another at Logan Airport, prior to approximately March 17, 1983, Respondent never assigned more than two Customs Inspectors to the position of screener on any particular shift. Their testimony in this respect is supported by a number of daily and/or shift belt assignments which indicate that on such days no more than two Customs Inspectors were assigned to the position of screener. These latter exhibits further show that on a number of other days no Customs Inspectors were assigned to the position of screener.3/ Further, according to the testimony of Mr. Pacewicz, Mr. Emmanuel and Mr. Byrd, subsequent to May 17, 1983, Respondent changed its policy and began assigning more than two Customs Inspectors per shift to the position of screener. Again, their testimony in this respect is supported by documentary evidence which consists of a number of daily and/or shift assignments which lists the names of the Customs Inspectors and their respective duty assignments.4/

3/ Supervisory Customs Inspector John Holzman, Respondent's only witness, testified that prior to March 17, 1983, he had assigned three Customs Inspectors to the position of screener on a shift. Upon further questioning, however, he acknowledged that he could not remember how many Customs Inspectors were assigned to screener positions on any given shift.

4/ The events leading up to the alleged change in policy with regard to assigning additional Customs Inspectors to screener positions on each arriving flight will be discussed infra. However, with respect

(continued)

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Mr. Pacewicz further testified that Customs Inspectors assigned to primary positions are expected to process thirty passengers per minute. Mr. John Holzman, a supervisory inspector, and Respondent's only witness, did not specifically deny the existence of such a standard. Thus, when asked whether a primary inspector on the belt "always inspects thirty passengers every half hour?", he merely replied "no." When asked if it could take longer, he replied that "it could."

On or about March 17, 1983, the Customs Inspectors at Logan Airport were informed of a staff meeting to be held that morning. Upon learning of the meeting from another employee, Union President Pacewicz contacted Supervisory Customs Inspector Holzman and inquired as to the purpose of the meeting and why the Respondent had failed to give the Union formal advanced notice of the meeting. Mr. Holzman replied that the purpose of the meeting was to inform the Customs Inspectors of the substance of his recent trip to Customs Headquarters in Washington, DC. Whereupon, Mr. Pacewicz told Mr. Holzman that Customs Inspector Richard Stevens would serve as the Union representative at the meeting.

During the course of the subsequent meeting, attendance at which was voluntary, Mr. Holzman informed the employees that the headquarters office was not satisfied with the number of narcotic seizures being made in the Boston area and that henceforth he would be assigning additional Customs Inspectors to the position of screener on each shift. The additional screeners would be responsible for performing, in addition to their current responsibilities, the additional duty of screening out arriving passengers who appeared to be good prospects and/or suspects for narcotic arrests. Mr. Holzman further informed the Customs Inspectors that the assignment to the additional screener positions would be on a voluntary basis. According to the uncontradicted testimony of Mr. Holzman, in the absence of a volunteer, there would be no additional screeners added to the floor.

(continued)

to whether or not there was an increase in the number of Customs Inspectors assigned to screener positions on any given shift after March 17, 1983, Mr. Holzman admitted that there had been an increase of at least one more screener per shift. In this latter connection, the record, particularly the shift assignment schedule for August 25, 1983 establishes that seven Customs Inspectors had been assigned to screener positions on that date. The August 25, 1983 shift assignment schedule further discloses that all twenty primary positions had been fully staffed with Customs Inspectors. Three Inspectors were listed in secondary positions.

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Following the close of the meeting, Mr. Pacewicz was informed by Mr. Stevens of the substance of the meeting and the fact that additional Customs Inspectors would be assigned to screener positions on each shift. Upon receiving the aforementioned information from Mr. Stevens, Mr. Pacewicz contacted Mr. Holzman and asked why the Union had not been given prior notice of the change and an opportunity to negotiate thereon. Mr. Holzman replied that there was not a change in procedure and therefore Respondent was under no obligation to bargain. Mr. Pacewicz then contacted Mr. Ralph Batchelder, Division Director of Inspection and Control, and asked him the same questions that he had earlier presented to Mr. Holzman. Mr. Batchelder replied that there had not been any change.

As noted above, subsequent to the meeting of March 17, 1983, Respondent has admittedly been assigning at least one more Customs Inspector to the position of screener on any given shift than had been the practice prior to the March 17, 1983 meeting. On August 25, 1983, Respondent assigned seven Customs Inspectors to the position of screener.

Discussion and Conclusions

The General Counsel takes the position that Respondent's action in unilaterally, without prior notice to the Union, changing both the job content of the screener position and the number of Customs Inspectors assigned to the position of screener on any given shift violated Sections 7116(a)(1) and (5) of the Statute. In support of its position, the General Counsel contends that the assignment of additional Customs Inspectors to screener positions impacts on the remaining Customs Inspectors assigned to primary and secondary position in that this latter group of Customs Inspectors is forced to take up the slack and process additional passengers, namely those passengers that would have been processed by the Customs Inspectors who had been removed from the conveyer belt and assigned to the floor as screeners.5/ Additionally, according to the General Counsel, inasmuch as the amount of narcotics arrests enter into an employee's yearly appraisal those Customs Inspectors remaining in the primary and secondary positions would be at a disadvantage since they would not have the luxury afforded to the screeners to select in a leisurely or unhurried manner potential narcotics carriers and thereafter conduct a thorough inspection of the suspects luggage.

5/ The aforementioned contention of the General Counsel appear to be premised on the assumption that Customs Inspectors assigned to screener positions would have otherwise been assigned to primary positions on the conveyer belt.

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The Respondent takes the position that assignment of additional Customs Inspectors to screener positions had no significant impact on the remaining Customs Inspectors assigned to primary and secondary positions on the conveyor belt. Further, according to Respondent in the absence of any showing of impact, it was under no obligation to give the Union prior notice and an opportunity to bargain. In support of its position the Respondent argues that the record is barren of any evidence indicating that but for their assignment to the position of screener the additional Customs Inspectors would have been assigned to primary positions on the belt. Additionally, Respondent takes the position that there is no requirement that an inspector process thirty passengers per minute while assigned to a primary position on the belt and points out that a primary position inspector may leave his position at any time to conduct a further inspection of any passenger thereby making it impossible to process passengers at such a pace.

In view of the above stated positions of the General Counsel and the Respondent, and since it is well settled that a Union is entitled to advanced notice and an opportunity to bargain concerning the impact and the manner of implementation of any changes in working conditions unilaterally made by an agency pursuant to its rights accorded by Section 7106(a) of the Statute,[6/] and since Respondent admits, and I so find, that there had been a change in the number of Customs Inspectors assigned to screener positions after March 17, 1983,[7/] it is obvious that resolution of the instant complaint turns on whether the assignment of the additional Customs Inspectors to screener positions on any particular shift had a significant impact on the working conditions of the unit employees.

The General Counsel, as noted above, would find that the change impacted significantly upon the unit employees for the following reasons: (1) Those Customs Inspectors remaining in primary positions on the belt would be forced to process additional passengers, namely, those passengers who would have been normally processed by the Customs Inspectors who had been removed from primary positions on the belt and assigned to the new additional screener positions, and (2) the Customs Inspectors assigned to screener positions would have a distinct advantage in the area of arresting narcotic smugglers since they would have the first opportunity to select prime suspects from the arriving passengers and the luxury of conducting a leisurely, but thorough, search of such passengers without having the time constraints customarily faced by those Customs Inspectors serving in primary positions on the belt. In this

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6/ United States Department of Justice, INS, El Paso, Texas, 11 FLRA 27; Department of Health and Human Service, SSA, 11 FLRA 78.

7/ See testimony of Supervisor Holzman, supra.

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latter connection, it is the General Counsel's position that inasmuch as narcotics seizures play an important role in an employees yearly appraisal, those employees not having the opportunity to serve as additional screeners on any given shift would have a harder time achieving the minimum number of seizures necessary to meet their yearly appraisal requirements.8/

Contrary to the General Counsel, upon the basis of the record evidence, I can not conclude that the assignment of additional Customs Inspectors to screener positions would necessarily result in a larger passenger processing load being imposed upon the Customs Inspectors remaining in primary belt positions. Thus, there is no probative evidence, whatsoever, in the record which indicates that the Customs Inspectors assigned to the additional screener positions on any given shift would have, but for such assignments, served at primary inspector positions on the belt. Both the testimony of Mr. Holzman, which is credited in this respect, as well as the daily belt assignments submitted as exhibits, make it clear that other than one coordinator per shift, there was not set formula utilized for purposes of dividing the Customs Inspectors among the remaining shift positions, namely, screener, primary inspector or secondary inspector. Rather, as noted in the factual portion of this decision, all assignments to the remaining three positions were made at the sole unrestricted discretion of the Supervisory Customs Inspector on duty.

The General Counsel has relied heavily on the shift or belt assignment for August 25, 1983 which indicates that on such day seven Customs Inspectors were assigned to screener positions. This same document indicates that all twenty of the available primary inspection positions had been assigned to other Customs Inspectors. In such circumstances, and since there were only twenty primary inspection positions at Logan Airport, I question how the assignment of additional Customs Inspectors to screener positions could have imposed, as contended by the General Counsel, an additional passenger processing burden upon the Customs Inspectors serving in primary inspection positions. There being no further openings at primary inspection positions, it would have been impossible to place the additional or new screeners on any position other than that of secondary inspector or as additional screeners. Inasmuch, as a secondary inspector merely serves as a back up to a primary inspector, the assignment of the additional screeners to back up positions would not appear to have resulted in a diminution of the primary inspector's passenger processing load.

8/ This latter argument of the General Counsel appears to be predicated on the fact that the screeners, after March 17, 1983, were assigned the further duties of seeking out and processing high risk narcotic suspects.

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In view of the above considerations, and particularly the absence of any probative evidence establishing that but for their assignment to the new screener positions such Customs Inspectors would have been assigned to primary positions on the belt where they would be responsible for processing part of the passenger load, I find that Respondent's action in assigning additional Customs Inspectors to screener positions did not add any significant additional passenger processing burden upon those Customs Inspectors then working at, or assigned to, primary inspection positions.

However, aside from the foregoing conclusions, I do find that by assigning the new additional screeners, as well as the existing screeners, expanded duties, i.e. the specific responsibility of searching for prime narcotics carrier suspects, Respondent has instituted a change which has a forseeable impact on the working conditions of unit employees.9/ As the amount or number of narcotics seizures is an element to be considered in an employees yearly appraisal any advantage given to one group of Customs Inspectors to achieve same, foreseeably serves as a detriment to, and impacts upon, the remaining Customs Inspectors not included in the select group. While, it might well be true that one of the basic responsibilities of a Customs Inspector is always that of stopping any suspected narcotics carrier, here, Respondent decided to specifically add such duty to the new screeners responsibilities and give them the opportunity to be the first to observe deplaning passengers, select prime suspects and, if circumstances warrant, conduct a leisurely search of the suspect. Although, Customs Inspectors in primary positions have an opportunity to stop prime suspects and search for narcotics, by virtue of the fact that they are at belt positions and working under the stress of processing many passengers, their opportunity for being successful in the area of narcotics seizures is of a second rate nature. Stated another way, the screener gets the prime suspects and the primary position Customs Inspector gets the dregs. Having diminished the opportunities of the primary position Customs Inspectors to achieve the requisite amount of narcotics seizures needed for an acceptable yearly appraisal, Respondent was under an obligation to give the Union prior notice of the change and an opportunity to request bargaining on the impact of the change and the manner of its implementation. Inasmuch as the record supports the conclusion that Union was not given such notice and opportunity, I find that Respondent violated Sections 7116(a)(1) and (5) of the Statute.

Applying the standards set forth by the Authority in Federal Correctional Institution, 8 FLRA 111, I further find that a status quo

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9/ Inasmuch as the change in the number of screeners per shift was integrally related to, and the reason for, the change in duties of the screeners, I find the change in duties of the screener to be encompassed by the outstanding complaint.

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ante remedy is in order. In this latter connection, the record indicates and I find, that the Respondent gave no notice to the Union prior to the change, immediately upon learning of the change the Union requested negotiations, Respondent refused to negotiate on the ground that there had been no change in conditions of employment, and an order requiring a return to the status quo existing on March 17, 1983, would not create undue hardship on Respondent or disrupt or impair its operations.

Having concluded that Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of its actions in increasing the number of screeners per shift and enlarging the duties of the screeners to include the active search for prime narcotics suspects, it is recommended that the Federal Labor Relations Authority adopt the following order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the U.S. Customs Service, Region I, Boston, Massachusetts, shall:

1. Cease and desist from:

   (a) Changing the number of screeners assigned to any given shift and/or changing the assigned duties of the Customs Inspectors serving in screener positions, without first giving the National Treasury Employees Union prior notice of the change and the opportunity to negotiate, to the extent consonant with law and regulations, on the impact and the manner of implementation of such change.

   (b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights accorded them by the Federal Service Labor-Management Statute.

2. Take the following affirmative action:

   (a) Rescind and withdraw the changes effected March 17, 1983, with respect to both the additional number of screeners assigned per shift and the additional duties to be performed by Customs Inspectors serving as screeners.

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(b) Notify the National Treasury Employees Union prior to effecting any changes in both the number of screeners assigned per shift and the duties assigned Customs Inspectors serving as screeners and, upon request negotiate, to the extent consonant with law and regulations, on the impact and the manner of implementation of any such changes.

(c) Post at the Logan International Airport, Boston, Massachusetts, copies of the attached Notice marked "Appendix" on forms to be furnished by the Regional Director for Region I, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, Boston District, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where Notices are customarily posted. The Director shall take reasonable steps to insure that such Notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region I, Federal Labor Relations Authority, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: February 16, 1984
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the number of screeners assigned to any given shift and/or change the assigned duties of Customs Inspectors serving in screener positions, without first giving the National Treasury Employees Union prior notice of the change and the opportunity to negotiate, to the extent consonant with law and regulations, on the impact and the manner of implementation of such changes.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind and withdraw the changes effected March 17, 1983, with respect to both the additional number of screeners assigned per shift and the duties to be performed by Customs Inspectors serving as screeners.

_____

(Agency or Activity)

Dated: _____ _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116; and whose telephone number is 617-223-0920.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 556, AFL-CIO

Respondent

and

Case No. 8-CO-37

PATSY K. PAIGE

Charging Party

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 556, AFL-CIO

Respondent

and

Case No. 8-CO-38

UNITED STATES DEPARTMENT OF THE
NAVY, NAVY EXCHANGE, PEARL
UNITED STATES NAVAL BASE
PEARL HARBOR, HAWAII

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled consolidated proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaints, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Respondent and the General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations as modified herein.

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With regard to the appropriate remedy for the violations found in Case No. 8-CO-37, the Authority agrees with the Judge that it is not material that the Union may have decided that the grievances or statutory appeals at issue were lacking in merit, as the Union had interjected itself into the grievance process, and had refused to assist the employees only because of their non-member status. At the same time, we also agree with the Judge, in the circumstances of this case, that a backpay remedy is not warranted, noting particularly the Judge's conclusion that "the weight of the evidence does not indicate that intervention by the Union would have resulted in the substantive relief sought by the grievant." Hines v. Anchor Motor Freight, 424 U.S. 554, 91 LRRM 2481 (1976). We do not agree, however, that the Union should pay for "legal representation, of the employees' choice." The facts of this case do not in our view warrant, and no party seeks, such an order. Rather, we will order that the Union provide representation, by its own or outside legal counsel if appropriate, to the employees if they choose to seek a waiver of time limits under either the negotiated grievance procedure or any statutory appeals procedures available to them to now file grievances or appeals.

With regard to Case No. 8-CO-38, the Authority agrees with the Judge's conclusion that the Union violated section 7131(b) of the Statute. While the solicitation in this case was undertaken by a person who was a full-time Union representative and not an employee within the meaning of the Statute, the record reveals that the Union representative specifically had requested duty time from management for four employees, resulting in overtime payments for two, to discuss the employees' concerns with their conditions of employment, and the Union representative used this time for another purpose, the solicitation of Union membership. In this regard, the Statute requires that "any activities" by an employee relating to internal union business, "including the solicitation of membership," be on nonduty time.1/ The requirement applies to an employee's use of duty time and, as here, whenever a Union representative meets with employees on their duty time for such purposes.2/ Since the Union knowingly violated the spirit and letter of section 7131(b), the Authority concludes, in agreement with the Judge, that the Union thereby violated section 7116(b)(1) and (8) of the Statute.

1/ Section 7131(b) provides:

§ 7131. Official time

. . . . . .

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership . . .) shall be performed during the time the employee is in a nonduty status.

2/ See American Federation of Government Employees, Local 1778, AFL-CIO, 10 FLRA 346, 351 (1982); American Federation of Government Employees, AFL-CIO, Local 2633 and Veterans Administration, Regional Office, Cleveland, Ohio, 2 FLRA 4, 8 (1979).

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ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Service Employees International Union, Local 556, AFL-CIO, shall:

1. Cease and desist from:

(a) Conditioning representation under the parties' collective bargaining agreement of non-members on their joining the Service Employees International Union, Local 556, AFL-CIO.

(b) Telling employees in the bargaining unit that it will not process grievances pursuant to the contractual grievance procedure because of their non-membership in the Union.

(c) Refusing to process grievances of bargaining unit employees because they are not members of the Service Employees International Union, Local 556, AFL-CIO.

(d) Soliciting Union membership on employees' duty time.

(e) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Represent the interests of all employees in the bargaining unit without regard to Union membership.

(b) Upon request, provide employees Patsy K. Paige, Miriam Gutowski, Marcela Santiago and Earl Kamanu with Union representation, by its own or outside legal counsel if appropriate, to allow them to seek a waiver of time limits either under the negotiated grievance procedure or applicable statutory appeals procedures, so that they might seek to process their grievances or file statutory appeals, and provide them whatever services the Union would have provided in this matter had it not acted discriminatorily.

(c) Post at its business offices and its normal meeting places, including all places where notices to members, and to employees of the Navy Exchange, Pearl, United States Naval Base, Pearl Harbor, Hawaii, are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority.

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Upon receipt of such forms, they shall be signed by the President of the Service Employees International Union, Local 556, AFL-CIO, or his designee, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where Union notices to members and unit employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT condition representation under the parties' collective bargaining agreement of non-members on their joining the Service Employees International Union, Local 556, AFL-CIO.

WE WILL NOT tell employees in the bargaining unit that the Service Employees International Union, Local 556, AFL-CIO, will not process grievances pursuant to the contractual grievance procedure because of their non-membership in the Union.

WE WILL NOT refuse to process grievances of bargaining unit employees because they are not members of the Service Employees International Union, Local 556, AFL-CIO.

WE WILL NOT solicit Union membership on employees' duty time.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL represent the interests of all employees in the bargaining unit without discrimination and without regard to Union membership.

WE WILL, upon request, provide employees Patsy K. Paige, Miriam Gutowski, Marcela Santiago and Earl Kamanu with representation, by our own or outside legal counsel if appropriate, to allow them to seek a waiver of time limits, either under the negotiated grievance procedure or applicable statutory appeals procedures, so that they may seek to process their grievances or file statutory appeals, and provide them whatever

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services the Union would have provided in this matter had it not acted discriminatorily.

_____
(Labor Organization)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 688-3805.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 556, AFL-CIO Respondent and PATSY K. PAIGE, An Individual and UNITED STATES DEPARTMENT OF THE NAVY NAVY EXCHANGE, PEARL, UNITED STATES NAVAL BASE PEARL HARBOR, HAWAII Activity	Case Nos.: 8-CO-37 8-CO-38

E. A. Jones, Esq.
For the General Counsel

Eric A. Seitz, Esq.
For the Respondent

Robert F. Griem, Esq.
For the Activity

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C § 7101 et seq. (hereinafter

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called the Statute), as a result of an unfair labor practice Consolidated Complaint and Notice of Hearing issued May 12, 1981 by the Regional Director, Region 8, Federal Labor Relations Authority, Los Angeles, California.

The Consolidated Complaint alleges that Service Employees International Union (hereinafter called the Union) violated section 7116(b)(1) and (8) of the Federal Labor Management Relations Statute (hereinafter called the Statute) by telling certain employees that the Union would not represent them in connection with their reduction-in-force unless they joined the Union; by telling employees that it had been instructed that employees could not file a grievance until they joined the Union; by not filing a grievance on behalf of the involved employees; and, by soliciting employees to join the Union while they were on duty status. Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held in this matter before the undersigned in Honolulu, Hawaii. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. All parties submitted timely briefs which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions.

Findings of Fact

The Activity operates two gas stations at the Pearl Harbor Naval Base. Prior to January 1981, one of the stations was fully automated while the other was a self-service station with lane attendants who collected cash from customers. The self-service station employed four employees in the NA-2/3 Mobile Equipment Services job classification. They were Patsy K. Paige, Miriam Gutowski, Marcela Santiago and Earl Kamanu.

In December 1980, the Activity automated the self-service station. Since the automated station did not involve either servicing cars or collecting cash in the lanes, the Activity decided that it no longer needed employees in the Mobile Equipment Service classification, the positions occupied by Paige, Gutowski, Santiago and Kamanu. Instead the Activity decided that it would operate the newly automated station with a lower paying classification, PS-2 checker/cashier, thus requiring a reorganization and reduction-in-force.

After making its decision to reorganize and conduct a reduction-in-force, the Activity, as is required by the collective bargaining agree-

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ment, Article 19, notified the Union by letter of its intention to conduct a reorganization.[1/] Union vice president Gregory Elliot acknowledged receipt of this notification. Elliot testified that he was contacted in early January 1981 about the reduction-in-force in the gas station, and that he then contacted Exchange Manager Gantz with a request to negotiate on the retention of credits, an area which the parties had not successfully resolved since 1979.

As provided in Article 19, Section 5 of the collective bargaining agreement, the four affected employees were notified, following the notification to the Union, on January 19, 1981, by a General Reduction-In-Force Notice, that each could be subject to a reduction-in-force by virtue of the reorganization of the self-service station. The General Reduction-In-Force Notice stated that the proposed action was being taken because of "a reorganization of the Service Station due to conversion to fully automated gas lanes". Each employee was given the general notice in the presence of a Union shop steward. The notice also stated that the employee could be terminated, but advised that each would receive a specific notice at least five calendar days prior to termination, and that at that time each would be advised of his or her job and appeal rights.

[1/] Article 19, of the Collective Bargaining Agreement, Reduction In Force states, in pertinent part:

> Section 1. This Article pertains only to regular employees. Reduction in force shall be defined as an action taken by Management to increase the efficiency, economy, or effectiveness of operations, causing the release of an employee through either separation, demotion, furlough for more than thirty (30) days, or reassignment requiring displacement. Reduction in force also occurs when the release of an employee is required due to lack of work or funds, reorganization, reclassification due to change in duties, or the need to make a place for a person exercising reemployment or restoration rights, within the Navy Exchange, Pearl Harbor. (Emphasis added.)
>
> Section 2. The Employer agrees that prior to giving Unit members official notice of a proposed reduction in force, the Union will be notified in advance of the proposed effective date, the number of employees involved, and the types of positions to be affected. The Union shall be provided an opportunity to express its views and offer suggestions regarding the proposed implementation. The Union agrees to render assistance in communicating the reason(s) for the reduction in force to members of the Unit who may be affected. The Union will have the opportunity to be present at all formal meetings held for the purpose of issuing reduction-in-force notices. (Emphasis added.)

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Following receipt of the general reduction-in-force notices the affected employees Paige, Gutowski, Santiago and Kamanu, along with a secretary, Sharon Smith and Union business representative Debbie Page[2/] and shop steward Robert Goroza met with Exchange Manager Gantz, Gas Station Manager Chun and a gas station supervisor, Linda Long on January 21, 1981. This meeting was apparently called to discuss the general reduction-in-force notices of January 19, 1981. It is not clear whether the Union attended this meeting to assist these employees, since Article 19 of the collective bargaining agreement provides that the Union will provide assistance in communicating reasons for a reduction-in-force to affected employees. What is clear is that the Union, before the meeting ended, assumed a representational role. Exchange Manager Gantz initially explained why the reduction-in-force was necessary and assured the affected employees that they would have first consideration for filling the new full-time PS-2 checker/cashier jobs at the automated station. Sharon Smith, who was unaffected by the reorganization, attempted to ask questions on behalf of the four employees. However, Union business representative Page inquired whether the employees wanted Smith or the Union to represent them concerning the reduction-in-force. Since the employees selected the Union, Smith was required by business representative Page to leave the meeting prior to its ending.

At the conclusion of the meeting, business representative Page requested and received permission to meet alone with the four employees and Union steward Goroza. After Activity representatives had departed, Page, according to the four employees, stated that assisting them would require "a lot of time after hours and on weekends to research" other avenues that might be taken to help the employees. Business representative Page then told the four employees that if they wanted her to help them, one of them would have to join or "rejoin" the Union. Page added that they would have five days to join the Union and that they could get the necessary papers from steward Goroza. In response to a question concerning the cost of membership Page informed them that new members paid $15.00 while renewing membership cost $50.00.

Supervisor Long's testimony corroborates that a fee was mentioned for Union membership during the meeting. Long stated that, after the meeting, she overheard a heated argument involving the four employees, Sharon Smith, and steward Goroza concerning what had happened in the meeting with Page. According to Long, she overheard them arguing over the $50.00 they were told they would have to pay for the Union to represent them. She

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2/ Page is a full-time business representative with two years experience in that position. Page also participated as a union negotiator and signed the present collective bargaining agreement between the parties.

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also overheard someone say that the contract was supposed to cover them up to arbitration. Long broke up this gathering and told the employees to follow the proper procedures if they wanted to talk to Goroza.

Union business representative Page's recollection of the meeting differs. According to Page, she explained to the employees that the reduction-in-force procedures had to be followed and that, if they were, it would take a lot more investigating to look into the matter. Page further states that she told employees that the Union would be looking into the reasons behind the reorganization, that the question had already been raised in the Union office, and that a Union vice president was looking into it. As already stated, vice president Elliot's testimony confirms the Union's awareness of the proposed reduction-in-force. Page testified that she told the employees that if they wanted the Union to represent them, they would have to fill out a representation form and that they had five days to fill out this form. Page also testified that a gentleman inquired if the employees had to be members of the Union for the forms to be processed, but recalls only that she probably responded, "[T]he Union strives on membership and we will be more than happy to have [you] become members." In conjunction with this question, Page also recalls the mention of fees for joining and rejoining the Union.

Union business representative Page further testified that, prior to processing a case, the Union representative or first line shop steward must have a letter of representation which is signed authorizing the Union to proceed. This letter of representation is required of members and nonmembers alike. There is no indication from the record that the employees confused this letter of representation with an authorization to join the Union.

Business representative Page also testified that at the time of the January 21, 1981, meeting she felt a grievance could not be filed although she did not explain this to the employees. Clearly, Page did not inform these employees that the matter could not be handled under a statutory appeals procedure, or that it could not be handled under the negotiated grievance procedure as is raised by vice president Elliot in his later testimony. Page states that she told the employees that the Union had seven days to appeal or take action on the General Reduction-In-Force Notice of January 19, 1981--leaving five days to sign a representation form, but later admitted that there was no pressing need on January 21, 1981, for signatures on authorization forms within five days. Her statement apparently left the four employees with the notion that this was a matter which could be handled under the grievance machinery and further confused the issue. In addition, Page admitted that the contract does not require a signature on an authorization form as a prerequisite to filing a grievance. Page also acknowledged that the contract permits grievances on any employee employment-related dissatisfaction.

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A review of the collective bargaining agreement does not disclose whether a reduction-in-force is or is not subject to the grievance procedure of Article 28. Further, grade and pay retention matters resulting from a reduction-in-force are normally appealable to the Office of Personnel Management under a statutory appeals procedure rather than through the grievance machinery. However, certain matters relating to reductions in force may be handled under the grievance machinery, as is pointed out later.

The meeting between Page and the four employees lasted about 15 minutes, and although Gutowski and Santiago had clocked out prior to the meeting, employees Paige and Kamanu were on the clock throughout both meetings with Activity and Union representatives. Since Paige and Kamanu were on the clock during these meetings, business representative Page spoke with supervisor Long after the meetings, telling her that the two employees should be paid overtime for the meetings. During the meeting with the employees, business representative Page also told employees Paige and Kamanu that she would make sure that they were paid for the time spent in the meetings that afternoon, and they were indeed paid overtime for the meetings.

Based on the credited testimony of the four affected employees, which is partially corroborated by the testimony of supervisor Long, it is found that Union business representative Page told these employees that if they wanted the Union to help them concerning the reduction-in-force they would have to join or rejoin the Union, and that the cost, depending on whether they joined or rejoined, would be either $15.00 or $50.00. It is also found, that the record establishes that Union business representative Page solicited membership of these employees while they were on the clock.

Later on the afternoon of January 21, 1981, Paige went to supervisor Long to inquire about filing a grievance. Long simply instructed Paige to follow the contract procedures. Paige then went to Union steward Goroza, and obtained from him a blank grievance form. As noted below, the contract procedure would indeed allow Paige to process any grievance without Union intervention.

Thereafter, Paige talked to her three fellow employees about filing a grievance for the group. In addition, the four employees conferred and agreed to each chip in enough money for Kamanu to join the Union since business representative Page had said she would represent them if one of them was in the Union. Kamanu testified that he found out about the grievance after it had been turned down by the Union. Later, when he learned that the Union was not going to help them, Kamanu told the other three that there was no sense in joining. For whatever reasons, none of the employees joined the Union.

Paige then drafted a grievance dated January 22, 1981 based on the January 21, 1981 meeting with Exchange Manager Gantz. The nature of the grievance was described as, "company is planning on adding more employees,

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which will be doing the same work at less pay. Also Mr. Gantz has no answers to our questions. But wants us to take a $1.14 drop in pay." Paige's grievance requested the following corrective action: "If I am doing the same work, I want the same pay." In essence, the grievance involved grade and salary retention, and as already noted, there is a serious question whether that aspect could have been processed under the grievance machinery.

Paige then tried unsuccessfully to contact business representative Page. Failing this, Paige requested shop steward Goroza to submit the grievance to business representative Page for her. Goroza took the grievance and said he would try to reach Page. However, Goroza apparently did not talk to Page, but instead took the grievance to chief steward Lynn Mata who told him she could not take it because the employees had not joined the Union. Goroza returned the grievance to Paige and told her what Mata had said.

Supervisor Long corroborates Paige, testifying that she overheard Paige and Goroza arguing about what Mata had said--that since none of them joined the Union, they were not going to be represented by the Union. Since this incident occurred at the gas station, Long asked Goroza what was going on. Goroza responded that he had just returned from Mata who had instructed him to return the grievance to Paige because the four employees had not joined the Union and paid the fees. Long then instructed the employees to return to work.

Based on the foregoing, it is found that chief steward Mata did in fact refuse to process the Paige grievance because none of the affected employees were Union members and that the employees were told that their lack of membership was the reason their grievance could not be processed.

The grievance form also states that it was submitted to a "Manager" on January 23, 1981. However, there is no record evidence that it was ever received or processed by any Activity official. In fact, Gantz on re-cross examination concedes that, "nothing had happened to these employees at that point so I don't see how they could have filed an appeal." 5 C.F.R. § 351.901 permits appeals by "[a]n employee who has been affected by a reduction in force action" to the Merit Systems Protection Board. However, there is no indication that these employees were ever informed of any appeal rights.

The collective bargaining agreement provides in Section 7 of Article 28 tnat an employee may present a grievance without intervention by the

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Union.3/ If indeed the grievance had been presented to a management official, as the grievance form suggests, it should have been processed without Union assistance. While this may be true, it is found that even if management did not process the grievance, the Union would not be relieved of its responsibility to represent these employees, particularly since it initially sought to represent them and its reason for not doing so was that these employees were not Union members.

Subsequently, Paige informed the other three employees of the Union's refusal to accept the grievance. Paige also inquired of supervisor Long

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3/ The parties collective bargaining agreement in Article 28, Grievance Procedures, contains several pertinent provisions concerning entitlement to representation, including:

> Section 2 C.(2). Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.
>
> Section 3. Complaints over the following shall not be processed under this procedure.
>
> (e) The classification of any position.
>
> Section 5. Appeal and Grievance Options. An aggrieved employee affected by discrimination may choose to raise the matter under either a statutory appellate procedure or the negotiated grievance procedure, but not both.
>
> Section 7. An employee or a group of employees may present grievances to appropriate management officials and have them adjusted without the intervention of the exclusive representative. . . .
>
> And, the following concerning processing of a grievance:
>
> Section 11. Step 1. The employee shall first submit the grievance, in writing . . . within ten (10) calendar days after the alleged violation. . . . The appropriate level of Union representation at Step 1 shall be the designated Shop Steward. . . . The Department Manager shall issue a written decision to the employee not later than ten (10) calendar days after the receipt of the grievance. . .

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what other options were available since the Union had refused to assist because they had not joined. Supervisor Long checked with Exchange Manager Gantz and gave Paige the telephone number of the local agent for the Federal Labor Relations Authority. Apparently, neither Long nor Gantz suggested that the grievance could be processed without Union intervention. Paige thereafter contacted the local Authority agent and filed the instant unfair labor practice charge on February 11, 1981, prior to implementation of the reduction-in-force.

Around March 31, 1981, the reorganization of the gas station was implemented. There is no evidence to suggest that any further grievance was filed or that the employees sought further assistance of the Union after the implementation. As a result of the reorganization, employee Santiago submitted her resignation and was rehired in the laundry, in the dry-cleaning plant; employee Gutowski exercised her retreat right to a presser position in the laundry; employee Kamanu was hired as a cashier/checker in the newly automated gas station; and, employee Paige went on maternity leave beginning in April 1981, but ultimdtely returned to a cashier/checker position at the newly automated station.

According to the Union's vice president Gregory Elliot, he was, as previously noted, aware of the reduction-in-force in early January 1981 and at that time he contacted Exchange Manager Gantz regarding negotiations. Gantz does not recall a specific contact, but assumes there was some contact with the Union concerning the reorganization. After the unfair labor practice charge was filed in early February 1981, Elliot again contacted Gantz concerning the reduction-in-force because he was concerned about possible financial liabilities of the Union. Elliot states that he informed Gantz of his concern with respect to the grade and pay retention and the way employees would be placed in the PS-2 positions. According to Elliot, Gantz told him that it was a reorganization and that was the way it was going to be handled. Elliot allegedly argued that the matter should be handled as a reclassification because of the change of duties, but Gantz responded that the Exchange was not going to give them the benefit of grade and pay retention. Gantz recalls that he had contact with the Union concerning the reduction-in-force following the January 21, 1981 meeting, but does not recollect the exact nature of these meetings. I credit Elliot in finding that the Union indeed contacted Activity management, in both January and February concerning the reduction-in-force, but was unsuccessful in its attempts to negotiate concerning the matter.

Elliot also testified that his research on the matter revealed that the only issue involved was whether the Activity's action was a reorganization or a reclassification. Certainly this is a matter about which the parties disagreed and the grievance machinery of the collective bargaining agreement could have been brought into play to resolve this

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difference in understanding. Nonetheless, Elliot states that the issue of pay could not be handled under the grievance procedure and that there were no regulations regarding what would happen to an employee moving between pay schedules in non-appropriated fund operations. Finally, Elliot testified that no grievance was filed concerning the actual implementation of the reduction-in-force because the Civil Service Reform Act provisions applied only to employees covered under the crafts and trades pay schedule and do not apply to the affected employees, and that the provisions of the Civil Service Reform Act concerning a [non-appropriated] employee's entitlements to the same pay cannot be addressed under a grievance procedure or under any appeals procedure.4/

Discussion and Conclusions

Section 7114(a)(1) of the Statute provides that a labor organization is "responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." Furthermore, the doctrine that an exclusive representative's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of

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4/ With regard to this obligation, the United States Code might well support this position. It states:

5 U.S.C. 5342(a)(2)(B) defines prevailing rate as:

> an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement. . .

5 U.S.C. 2105(c) states that nonappropriated fund employees are not employees for the purpose of (1) laws (other than subchapter IV of Chapter 53 and sections 5550 and 7154 of this title) administered by the Office of Personnel Management.

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all members of that unit without arbitrariness or discrimination, and to exercise its discretion with complete good faith and honesty to avoid arbitrary conduct, has long been accepted by the Supreme Court. Vaca v. Sipes, 386 U.S. 171 (1967).

The Union insists that the General Counsel has not produced any evidence that it failed or refused to fulfill its obligation of fair representation to the four employees herein. The Union argues that from the time it first learned of the employer's planned reorganization, it expended considerable effort, first investigating and then opposing the proposed reduction-in-force. Further, it states that no grievance was filed during January or February 1981 because the Agency was only proposing to act and had not taken such action. After the reduction-in-force was implemented, it decided not to file a grievance or appeal because it concluded that there was no grievable or appealable matter.

Although the grievance here may have been complex and time consuming, that alone is not determinative of whether the Union breached its duty of fair representation. The statutory obligation of an exclusive representative to represent all members of a designated unit is breached when conduct by the Union is arbitrary, discriminatory, or in bad faith, Vaca v. Sipes, supra. The credited evidence discloses that Union business representative told employees Paige, Gutowski, Santiago and Kamanu on January 21, 1981 that the Union would represent them only if they joined or "rejoined"; that these employees were given a five day limit in which to join the Union; and that they were going to have to pay money to obtain representation. Page, as the record revealed, is a full-time business representative who also acted as a negotiator for the present collective bargaining agreement. Page's own testimony and the testimony of others indicated a degree of assertiveness in ordering Smith from the January 21 meeting and in seeking overtime for the four employees. Thus, if the Union had no obligation initially to assist these employees, Page undertook the obligation to represent them. In assuming this obligation, the Union assumed the concurrent obligation not to act in an arbitrary or discriminatory way.

Certainly Page was interested in obtaining and maintaining union membership for as she states, the Union "strives" on membership. The conclusion is inescapable that Page used this opportunity to seek to obtain additional membership for the Union. Therefore, full credit must be given to the employees accounts, fragmented as they are, that Page indeed solicited their membership before the Union would assist them in this matter. Page's credibility is further strained by the action of chief steward Mata who later refused to process the Paige grievance because the employees were not Union members. Mata's refusal because they had not joined the Union leaves little doubt about the Union's motivation here. In all the circumstances, the only reasonable inference to be drawn is that Page actively sought out Union membership in exchange for

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assisting these employees, and when they refused to join the Union halted any action by it on the reduction-in-force until after an unfair labor practice charge was filed. Accordingly, it is found that the General Counsel established by a preponderance of the evidence that Page's attempt to require these employees to join the Union in order to obtain Union assistance with their reduction-in-force was discriminatory and in violation of section 7116(b)(1) and (8) of the Statute.

With respect to the Mata incident, the credited corroborated evidence is that the grievance filed by Paige was rejected by the Union and returned to Paige for one reason, that these employees were not Union members. It is settled law that a union need not process a frivolous grievance. Vaca v. Sipes, supra. Finding a violation turns not on the merits of the grievance, but rather on whether the Union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations. A deliberate and unjustifiable refusal to process a grievance for discriminatory reasons constitutes a violation of the Statute. While the Union argues in mitigation that it was engaged in investigation and made proposals concerning the reduction-in-force, its investigation of the matter and attempts to negotiate appear rather cursory prior to the filing of the instant unfair labor practice charge.

Indeed, a labyrinth of regulations concerning reduction-in-force, pay and grade retention exist. See, 5 C.F.R.§ 351, et al. Although the matter was complicated, it apparently was not impossible to solve as Union efforts after the unfair labor practice was filed clearly show. Thus, the Union, if it handled the matter at all gave only a superficial effort and without question rejected the grievance because these employees were not members. An escalation of its handling of the matter after the unfair labor practice was filed does not alter the fact that the grievance was initially rejected for membership reasons. Furthermore, there is no evidence that its attempts to resolve the matter were ever conveyed to any of the affected employees, and they were left with the impression that the only reason that their grievance was not processed was because they were not Union members. Such action by an exclusive representative in requiring membership in order to accept and process a grievance of an employee in a unit which it represents is discriminatory and interferes with, restrains and coerces employees in violation of section 7116(b)(1) and (8) of the Statute.

With respect to the independent allegation that the Union unlawfully solicited membership during work time, the Union does not deny that its agents may have engaged in impermissible solicitation, but contends only that, if so, the conduct was negligent and unintentional rather than deliberate. It does, however, question whether the employees herein were in duty status. The record disclosed that while two employees had clocked out, two others were still on the clock and working, and that they were indeed paid overtime at the Union's request for participation in the meetings.

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The General Counsel contends that section 7131(b)[5/] precludes the use of official time by a union for conducting internal union business such as soliciting of membership. There is ample record evidence, as noted above, to show that at least two of the affected employees were not in a "non-duty" status since they were still on the clock and were subsequently paid by the Activity for the time spent at the meeting. In such circumstances, solicitation of these employees for Union membership is prohibited by the Statute. Accordingly, it is found that the Union's conduct in soliciting membership from employees in duty status is prohibited by section 7131(b) and in violation of section 7116(b)(1) and (8) of the Statute.

The Remedy

Having found that the Union did engage in conduct violative of section 7116(b)(1) and (8) of the Statute it is recommended that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Statute.

The question of back pay for breach of the duty of fair representation by a union has never been considered by the Authority. There is no doubt that the Authority is empowered under section 7105(g)(3) and 7118(a)(7) of the Statute to fashion such a remedy where warranted.

The General Counsel argues that the egregious conduct engaged in by the Union warrants a remedy requiring that the affected employees be made whole for any pay lost as a result of the reduction-in-force action, from the date of the reduction-in-force implementation to the date the Union secures consideration of the grievance filed by those employees, or that the employees affected obtain the position they would have obtained had there been no violation by the Union. I disagree that such a remedy is appropriate in this particular matter.

The Supreme Court set out the basic principle for apportionment of damages for breach of fair representation in Vaca v. Sipes, supra, as follows:

5/ Section 7131(b) of the Statute provides:

> Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

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> The governing principle then is to apportion liability between the employer and the Union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the Union, but increases if any in those damages caused by the Union's refusal to process the grievance should not be charged to the employer.

Thus, where there is a breach of fair representation, only the liability for any intervening wage loss or losses which are not the result of an employer's discrimination or breach would fall upon the union.

In proposing such a remedy the General Counsel no doubt seeks to discourage illegal distinctions between members and non-members, but ignores a basic formula running through all breach of fair representation questions, that in order to establish legal damages, it must be shown that the employee initially suffered from an improper action from an employer's breach and that the Union could have secured some relief. Even where, as here, a deliberate and unjustifiable refusal to process a grievance is found, there remains a question of entitlement, since damages are generally not warranted except where they are to compensate for injury suffered. This record does not establish the foregoing.

Contrary to the General Counsel's theory which assumes that the matter grieved is meritorious, it is my view, that there must be a substantial reason to believe that the Union's breach of its duty contributed to any loss which is compensable. Assignment of fault for liability prior to a determination of record that any liability exists has several flaws. First, any damages for which the Union might be responsible might well be de minimis. Secondly, there is no indemnification for the Union, if after processing the grievance it found to lack merit. Further, federal sector labor policy would not be served by requiring a union to pay damages where the employee would not be able to obtain the substantive relief sought by his or her grievance or appeal.6/ And, finally the Union's action herein

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6/ The Federal Labor Relations Council, found in Department of the Interior, Bureau of Reclaimation, Yuma Project Office, Yuma, Arizona, FLRC No. 74A-52, that the jurisdiction over certain employees appeals, particularily a reduction-in-force involved in that case, fell within the jurisdication of the Civil Service Commission and the determination of whether employees were entitled to back pay was for exclusive determination by the appeals procedure under section 19(d) of the Executive Order and not the Assistant Secretary. The Council held that an unfair labor practice

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did not prevent these employees from either filing or pursuing a grievance or statutory appeal, on their own, in a timely manner.

The instant record offers no clear and convincing evidence that a grievance or appeal would have been successful or would have resulted in any of these employees retaining pay or equivalent positions at their level prior to the reduction-in-force.7/ If anything, the record

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6/ continued

complaint may not be used as an alternative method for obtaining redress for the employees who properly have access to the appeals procedure. There the Council's rejection seemingly is based not on any reluctance to remedy the alleged violations, but instead on finding itself without authority to grant such a remedy. The Yuma case, however, does not preclude the Authority from granting a back pay remedy here. The Statute, unlike the Executive Order contains broad discretionary language for remedying unfair labor practices including section 7117(a)(7)(D) which includes broad authority to take "such other action as will carry out the purposes of this chapter". Thus, the Authority is clearly vested with discretion to grant any reasonable remedy where it deems such a remedy would effectuate the purposes of the Statute.

7/ The private sector cases cited by the General Counsel are inapposite. Those cases involve matters where the employer plainly disregarded clear-cut contract provisions without objection from the exclusive representative and the employees were clearly entitled to make whole remedies. The General Counsel maintains that uncertainty as to the potential merit of the grievance should be resolved in favor of the victims, not the wrongdoer, since it is the Union's wrongdoing that created the uncertainty. This argument overlooks the fact that in this case there may well be no wrongdoing for which compensation is due, since there is a real question as to whether these employees are entitled under government regulations to retain pay and grade. Further, it overlooks a crucial element, that the reduction-in-force involved here was never challenged as discriminatory or mistaken. Moreover, while the National Labor Relations Board adopts the position that fault must be assumed, it is not universally accepted. See, N.L.R.B. v. Local 485, International Union of Electrical, Radio and Machine Workers, AFL-CIO Automative Plating Co. 454 F.2d 17 (2d (Cir) where the Court found such a remedy speculative and punitive. Compare, Truck Drivers, OCL Drivers, Local 705, 209 NLRB 292 (1974).

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establishes that the servicing of cars and collecting cash, performed by these employees in the higher classification was no longer required in the automated station. Under such circumstances, they may well not have been entitled to retained pay or grade. Thus, the weight of the evidence does not indicate that intervention by the Union would have resulted in the substantive relief sought by the grievant Paige, i.e., same pay for same work, since the work appears from the record to be at a lower classification and somewhat different. Nor does the evidence indicate that negotiations with the Activity would have resulted in a satisfactory resolution for these employees. If, however, negotiations would satisfy its obligation, the Union contacted the Activity in early January before the unfair labor practice charge was filed and sought negotiations, but was rebuffed. Furthermore, as Respondent's uncontroverted testimony disclosed, these employees, who are non-appropriated fund employees, could well not be covered by any grievance or appeal procedures which would require retention of pay or grade in a reduction-in-force. For the Authority to grant such a remedy without that determination having been made would be purely speculative.

Here the record establishes only that employees at the automated station, after the reorganization, performed lesser work which may or may not have required a reduction in pay and grade. It does not reveal, nor is it alleged, that there was either discriminatory treatment of these employees by the Activity during the reorganization or that there was any mistake in the reduction-in-force. Such an issue should be resolved either through the grievance machinery or through the statutory appeals procedure, each of which the Union argues is unavailable. To order back pay prior to that determination would be punitive.

Another difficulty with the General Counsel's proposed remedy, is that it overlooks potential liability of the Agency concerning whether or not the reduction-in-force was discriminatorily or mistakenly conducted. The record does not reveal nor is it suggested by the parties that the reduction-in-force was defective. If not, there is no liability for damages since the fundamental purpose of such a remedy is to compensate for injuries suffered as a result of a breach by the employing agency and for whatever other losses these employees may have suffered as a result of Union discrimination in failing to pursue the grievance. It must be recognized that the decision to reorganize and to perform the reduction-in-force was exclusively within the province of management and that the Union on its own can neither reinstate these four employees nor, since all time limits have expired, grieve or appeal the matter unless the Activity or the government agency assigned to police the matter now agrees to accept a grievance or appeal. Notwithstanding the Union's wrongful conduct, the fact remains that any compensable injury for which liability

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initially exists, would have to result from discrimination or a mistake attributable to the employer's conduct, not the Union. Therefore, a determination of what injury was suffered must be made before the Union can be ordered to make any payment of damages to these employees. In this regard, cases such as Vaca v. Sipes, supra; Bowen v. United States Postal Service, et al, 103 S. Ct. 588 (1983); Czosek v. O'Mara, 397 U.S. 25 (1970); Harrison v. Chrysler Corp., 558 F.2d 1273, 1279 (1977), all agree that the Union is responsible not for damages solely attributable to an employer's breach, but only for increases in damages caused by its own breach. Such damages include legal fees and intervening wage losses. This record shows neither. The net result of the General Counsel's proposed remedy then would be to require no determination of that liability, but require payment of damages by the Union before any determination of liability has been made regardless of whether there is a compensable injury. Such a result is incongruous with the general principle that the Union is responsible only for damages caused by its own breach since no damages have been shown.

The Union alleges that this matter was not subject to the parties' grievance machinery or to a statutory appeals procedures due to the status of these non-appropriated fund employees. Indeed, a maze of regulations exist concerning reductions in force and pay and grade retention. In taking such a position it shows a bias or predetermination which would bar it from further effectively processing the matter, even if all time limitations had not expired. The legislative history of the Statute indicates Congress' intent to include reduction-in-force coverage under the negotiated grievance procedure, absent the parties' exclusion of such coverage. See Legislative History of Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, p. 730, 735, 769, November 19, 1979. Contrary to the Union's position that these employees were covered neither by the negotiated procedure or a statutory appeals procedure, it is found that whether the Activity's action was a reorganization or reclassification was indeed an area which might have been considered under the negotiated procedure, and the Union's refusal once a grievance was filed undermined any opportunity for resolution through that machinery. Under the Union's theory that there is no statutory appeal procedure or grievance available, these employee's have no protection against a discriminatory or mistaken reduction-in-force. As business representative Page testified, the grievance procedure was available for any employee dissatisfaction. Since the grievance machinery does not preclude grievances concerning reorganizations, it is found that the Union could have, at the very least, attempted to process the grievance through the procedures agreed to by the parties.

Here the facts are sufficient to establish discrimination by the Union which seriously undermined any effort by these employees to successfully pursue the grievance or appeal, either on their own or with Union

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assistance.[8]/ The remaining question is, what relief is available, if any, for these employee's claim that they have failed to secure any relief. Having answered that their problem might well have been resolved, if not remedied favorably to them, through the negotiated grievance machinery, and that the matter might have been considered under that machinery, it is recommended that the Authority, under the broad remedial discretion of section 7118(a)(7)(D), order, in addition to a cease and desist order and notice posting, that the Union provide, at its' expense, legal representation, of the employee's choice, to assist them in seeking to obtain waivers of time limits, both under the negotiated grievance machinery and the statutory appeals procedure, if necessary, so that they might process a grievance or appeal relating to the March 31, 1981 reduction-in-force, and to provide further services which would have been performed by the Union in assisting these employees in the reduction-in-force matter, had it not acted discriminatorily in refusing to assist in the reduction-in-force or to process the Paige grievance. Finally, it is recommended that the Authority retain jurisdiction over this matter in order to reconsider the remedy and provide further appropriate remedial provisions should they become necessary.

Based on the foregoing, it is recommended that the Authority adopt the following:[9]/

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[8]/ Although the Agency was not charged in this matter, it occurs that it was at equal fault here in not advising these employees as to exactly what their appeal rights were in this reduction-in-force. The record reveals several opportunities for such action by the Activity, including an opportunity to accept and process the initial grievance on January 23, 1981 without Union intervention. The Activity must bear some of the burden herein since its erroneous actions and advice at least contributed to these employees not having a grievance processed to resolution, whether satisfactory or unsatisfactory to them.

[9]/ Based on the above, it is unnecessary to decide whether the Union's liability should be limited, as argued at the hearing. Assuming that a back pay remedy is appropriate however, I agree with the General Counsel that the reschedulings of the matter for hearing were not objected to by the Union nor was it alleged that these reschedulings were in any way improper or that they would create a hardship for the Union. In such circumstances, it is difficult to envision that the reschedulings had any connection with limiting the Union's back pay liability in this matter.

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ORDER

Pursuant to section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7118(a)(7)(A), and section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. section 2423.29(b)(1), the Authority hereby orders that Service Employees International Union, Local 556, AFL-CIO, shall:

1. Cease and desist from:

(a) Conditioning representation under the parties' collective bargaining agreement of non-members on their joining the Service Employees International Union, Local 556, AFL-CIO.

(b) Telling employees in the bargaining unit that it will not process grievances pursuant to the contractual grievance procedure because of their nonmembership in the Union.

(c) Refusing to process grievances of bargaining unit employees because they are not members of Service Employees International Union, Local 556, AFL-CIO.

(d) Soliciting employees to join the Union while those employees are on duty status.

(e) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Advise all employees in the bargaining unit that the Service Employees International Union, Local 556, AFL-CIO, will represent the interests of all employees in the unit without discrimination and without regard to labor organization membership.

(b) Upon request, provide employees Patsy K. Paige, Miriam Gutowski, Marcela Santiago and Earl Kamanu with a legal representative of their own choosing at the Union's expense, to allow them to seek a waiver of time limits either under the grievance machinery or a statutory appeals procedure so they might seek to process their grievance or file a statutory appeal and to provide further services which would have been provided by the Union had it not acted discriminatorily.

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(c) Post at the Activity, Navy Exchange, Pearl, United States Naval Base, Pearl Harbor, Hawaii, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the Union and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken by the Union to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 8, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: February 28, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT condition representation of nonmembers on their joining the Service Employees International Union, Local 556, AFL-CIO.

WE WILL NOT tell employees in the bargaining unit that the Service employees International Union, Local 556, AFL-CIO will not process grievances pursuant to the contractual grievance procedure because of their nonmembership in the Union.

WE WILL NOT solicit employees to join Service Employees International Union, Local 556, AFL-CIO while on duty status.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce any employees in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL NOT refuse to process grievances of bargaining unit employees because they are not members of Service Employees International Union, Local 556, AFL-CIO.

WE WILL advise all employees in the bargaining unit that Service Employees International Union, Local 556, AFL-CIO, will represent the interests of all employees in the unit without discrimination and without regard to labor organization membership.

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WE WILL, upon request, provide employees Patsy K. Paige, Miriam Gutowski, Marcela Santiago and Earl Kamanu with a legal representative of their own choosing, at the Union's expense, in order to allow them to seek waiver of time limits either to process the grievance or under a statutory appeals procedure and to provide them whatever services the Union would have provided in this matter had it not acted discriminatorily.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 8, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California, 90071, and whose telephone number is: (213) 798-3805.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARITIME METAL TRADES
COUNCIL

Union

and

Case No. O-NG-946

PANAMA CANAL COMMISSION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of five Union proposals. Upon careful consideration of the entire record, including the parties' contentions,[1/] the Authority makes the following determinations.

Union Proposal 1

> Professional employees are authorized to cash personal checks at the Commission's Treasury or its branches in amounts up to $1,000.00. Two returned checks not the fault of the banking institution will be cause for revocation of personal check cashing privileges for a period up to six months.

1/ The Union requests a hearing before the Authority apparently based on certain alleged factual discrepancies in the record, such as availability of banking facilities for bargaining unit employees. However, such information is not relevant to a determination of whether a matter is within the scope of bargaining under the Statute, i.e., consistent with law or applicable rule or regulation. Further, it is well established that the parties bear the burden of directing the Authority to the laws, regulations and other authorities relevant to the statutory obligation to bargain. National Federation of Federal Employees, Local 1167 v. FLRA, 681 F.2d 886 at 891 (D.C. Cir. 1982), affirming National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981).

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Union Proposal 2

The Commission will do everything it can to see that professional employees are authorized to cash personal checks at the Commission's Treasury or its branches in amounts up to $1,000.00. Two returned checks not the fault of the banking institution will be cause for revocation of privileges for a period up to six months. The Commission will report to the Union weekly on its progress in achieving this goal.

Union Proposal 1 would authorize professional employees personal check cashing privileges at the Agency's Treasury and/or its branches of up to $1000.00. Union Proposal 2 would require the Agency to do everything it can to ensure this result if the Agency ascertains that the proposal could not be implemented due to the regulations of an outside authority. The record indicates that presently employees have limited check cashing privileges at the Agency.

The sole contention of the Agency is that personal check cashing is not a condition of employment within the meaning of section 7103(a)(14) of the Statute, and therefore is outside the scope of bargaining. The Union contends that personal check cashing is a condition of employment, and, alternatively, that the Agency's past practice of providing personal check cashing privileges makes such matter a condition of employment.

The duty to bargain under the Statute extends only to "conditions of employment," i.e., personnel policies, practices and matters affecting working conditions. In construing that statutory phrase, the Authority has found proposals which concern matters directly affecting "the work situation and employment relationship" of bargaining unit employees to be within the duty to bargain. E.g., National Treasury Employees Union and Internal Revenue Service, 3 FLRA 693 (1980). See also American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 606 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945, 102 S.Ct. 1443 (1982).

By their terms and effect, the disputed proposals do not concern personnel policies, practices, or matters affecting working conditions of unit employees. In this regard, the Authority concludes that personal check cashing is a matter which has no direct relationship to the work situation and the employment relationship of unit employees. Rather, such matter principally relates to activities of employees involved in non-work activities while in non-duty status. Cf. International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981)

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(wherein the Authority concluded that a proposal requiring the agency to grant off-duty personnel and their dependents hunting and fishing recreation on the facility did not concern matters which were a condition of employment because there was no relationship to the work situation or employment relationship) and National Federation of Federal Employees, Local 1363 and United States Army Garrison, Yongsan, Korea, 12 FLRA 635 (1983) (wherein the Authority concluded that a proposal regarding the dispensation of alcoholic beverages in NAFIs did not concern matters which were conditions of employment within the meaning of section 7103(a)(14) of the Statute, since such matters principally relate to activities of employees involved in non-work activities while in non-duty status).

The Union asserts its proposals are to the same effect as the proposal in National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980), enforced sub nom. Department of Defense, Department of the Army v. FLRA, 685 F.2d 641 (D.C. Cir. 1982), wherein the Authority concluded that the matter of ration control was a "condition of employment" within the meaning of section 7103(a)(14) of the Statute. Such matter was found to be directly related to the "reasonable standards of health and decency" for unit employees serving in certain locations required by an agency policy as a precondition to the employment relationship. In the circumstances of the present case, to the contrary, the policies of the Agency regarding personal check cashing privileges have not been shown in the record to be a precondition to the employment relationship.

Nor can the Union's additional argument that personal check cashing has become a condition of employment because of the Agency's past practice of providing this service be sustained. The mere fact that an agency may unilaterally provide such a service does not, per se, make such a matter a condition of employment subject to the duty to bargain under the Statute, i.e., a personnel policy or practice or matter affecting working conditions of employees in the bargaining unit. Cf. National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Union Proposal 4) (wherein the Authority concluded that the mere fact that an agency may, pursuant to statutory authority, permit payroll allotments for any legal purpose does not mean that all such allotments constitute conditions of employment over which it has a duty to bargain).

Hence, the Authority finds that the disputed proposals regarding personal check cashing privileges do not concern matters which are conditions of employment within the meaning of section 7103(a)(14) of the Statute. Therefore, the Agency is not obligated to bargain with respect to the proposals.

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Union Proposal 3

The Commission hereby adopts the travel regulations of the Department of State applicable to Federal Government employees working overseas.

Union Proposal 4

The Commission will do everything it can to adopt the travel regulations of the Department of State applicable to Federal Government employees working overseas. The Commission will make quarterly reports to the Union on its progress in achieving the goals set forth in this article.

Union Proposal 3 would require the Agency to adopt the travel regulations of the Department of State applicable to that agency's employees working overseas. Union Proposal 4 would require the Agency to do everything it can to ensure this outcome. Presently, the Agency follows the Federal Travel Regulations (FTRs) which are applicable to official travel of civilian employees of Government agencies, including civilian employees of the Department of Defense, as authorized under 5 U.S.C. §§ 5701-5709. The Union's stated purpose of these proposals is to have the Agency supplant its present policy of following the FTRs with a policy of following State Department regulations instead.

The regulations at issue in the present case, the FTRs, are incorporated by reference in Part 101-7 of the FPMRs, 41 CFR 101-7, promulgated by the Administrator of General Services. These regulations, as relevant herein, were issued under the authority of 5 U.S.C. §§ 5701-5709. By their terms, these regulations generally apply to and are binding on the Federal civilian work force as a whole, though not, of course, to every Federal employee. As such, these regulations are generally applicable throughout the Federal government and are "Government-wide regulations" within the meaning of section 7117(a). See American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA 446 (1983).

The Union contends that, since the Agency here, before the passage of the Panama Canal Act of 1979, was a government controlled corporation and therefore was not covered under the FTRs issued under the authority of 5 U.S.C. §§ 5701 - 5709, it is questionable whether Congress intended the Agency to come under the FTRs by the passage of the Panama Canal Act. However, the Union's contention is without merit. The passage of Panama Canal Act of 1979 converted the Agency into an executive agency. Panama Canal Act, Pub. L. No. 96-70, § 1101, 93 Stat. 452, 456 (1970). Chapter

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57 of title 5 grants, in relevant part, executive agencies the authority to provide travel expenses to their employees pursuant to the FTRs, the regulations implementing that statutory provision. Therefore, the Agency here, as an executive agency, must follow the FTRs.2/ Union Proposal 3, thus, is contrary to Government-wide regulations and, consequently, outside the duty to bargain.

According to the Union's stated intent, Union Proposal 4 would require the Agency to do whatever it can, including suggesting to Congress that a legislative change permitting the Agency to adopt the travel regulations of the Department of State is advisable. The Authority has held in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 8 FLRA 409 (1982), that matters specifically provided for by law or which would require modification of existing legal or regulatory provisions are not within the duty to bargain. According to the reasoning in the Office of Personnel Management case, proposals concerning influencing the content of Government-wide regulations to affect conditions of employment are outside the duty to bargain because the relationship between such efforts, on one hand, and changes in personnel policies, practices, and matters affecting working conditions, on the other hand, is, at best remote and speculative. Since, as stated earlier, the FTRs are Government-wide regulations within the meaning of section 7117(a), the Agency has no obligation to bargain over their modification for the reasons more fully set forth in Office of Personnel Management.

Union Proposal 5

> The Commission will do everything it can to see that a professional employee shall continue to receive official mail at his work station. Official mail includes, but is not limited to, letters, journals, magazines and newspapers which relate to the employee's performance of his official duties.

The purpose of the Union's proposal is to define what material constitutes official mail, i.e., mail which relates to the employee's performance of official duties. In National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 255

2/ In this respect, the Authority, contrary to the Union's argument, agrees with the Agency's contention that the educational travel benefits specifically provided for in the Panama Canal Act at section 1207 indicate that when Congress intended to exempt the Agency from the FTRs, such intent was clearly expressed.

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(1979), the Authority held that in the context of section 7106(b)(1)[3/] the "means" of performing work refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or the furthering of the performance of its work. Cf. American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missile Command, Redstone, Arsenal, Alabama, 10 FLRA 440 (1982) (Union Proposal 3) (a proposal requiring the acquisition and/or use of certain taped documents and teletype-writer equipment, clearly concerned the "technology, methods, and means of performing work" within the meaning of section 7106(b)(1) of the Statute).

It is clear that under section 7106(b)(1) of the Statute the Agency has the right to determine the tools used in performance of the Agency's work. In this respect, the Authority concludes, in agreement with the Agency, that Union Proposal 5 insofar as it would establish what outside information is necessary to perform official duties and, thus, the tools to be used in performing the Agency's work, violates the Agency's right to determine its means of performing work under section 7106(b)(1) of the Statute.[4/]

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ Section 7106 provides in relevant part:

§ 7106. Management rights

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, . . . on the technology, methods, and means of performing work[.]

4/ In view of this decision, it is unnecessary to address the additional contentions of the Agency with respect to the negotiability of the proposals.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE NAVY
NAVAL ORDNANCE STATION
LOUISVILLE, KENTUCKY

Respondent

and

Case No. 4-CA-20204

LOCAL LODGE 830
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the stipulation of facts, accompanying exhibits, and the parties' contentions, the Authority finds: The amended complaint alleges that the Respondent failed to bargain in good faith with the Charging Party, Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), in violation of section 7116(a)(1) and (5) of the Federal Service Labor Management Relations Statute (the Statute),[1/] when, following negotiations between the parties, and no mutual agreement

---

1/ Section 7116(a)(1) and (5) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

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having been reached on certain matters, the Respondent implemented, on or about January 3, 1982, the reorganization of Cost Center 09, Public Works Department and, as a result of the reorganization, reassigned David Baumer, Area Steward, from Cost Center 09, Public Works Department to the Production Maintenance Department, Division 205, thereby unilaterally changing the terms of the parties' collective bargaining agreement without bargaining with the Charging Party.

IAM and the Respondent entered into a collective bargaining agreement on or about September 20, 1974, which was amended in part on September 26, 1976, and expired on September 19, 1977. The parties have since then been engaged in negotiations for a new collective bargaining agreement. On or about June 1981, IAM received notice from the Respondent that Cost Center 09, Public Works Department would be reorganized, and that some of the functions of the Cost Center would be transferred to the Production Maintenance Department, Division 205 (a new division created to undertake the transferred functions). Upon receiving the notice, IAM requested that the Respondent bargain concerning certain aspects of the proposed change, including the number and location of stewards. During September and October the parties bargained over the proposed reorganization, including the matter of stewards. IAM proposed (1) that David Baumer would continue to serve as Area Steward of Cost Center 09, and would become the Area Steward of the Production Maintenance Department, Division 205, and (2) that Joseph Nevitt would continue as Steward of Cost Center 09. The Respondent argued that an already existing vacant steward position should be shifted to Division 205 or, alternatively, that Nevitt should become an Area Steward. The parties stipulated that at no time during the September-October negotiations did the parties reach mutual agreement and, in fact, reached an impasse on certain aspects of the reorganization, including the number and location of stewards, and specifically the area of stewardship of Baumer.

On or about November 25, 1981, by memorandum to IAM, the Respondent, noting the parties' impasse on these issues, and stating that the Respondent was available for further negotiations, advised IAM that, pursuant to the mandate of its Inspector General, reorganization would take effect on January 3, 1982. On March 5, 1982, IAM filed its charge in this case. It did not at any time seek the assistance of the Federal Service Impasses Panel.

The General Counsel contends that no valid impasse had been reached herein. We disagree. An impasse is that point in negotiations at which the parties are unable to reach agreement. U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 288, 293 (1981); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA No. 32 (1981) at 12 of the Judge's Decision. Here, the parties engaged in negotiations, and did not reach an agreement at any time. The Respondent gave the Union more than a month's notice of the effective date of the reorganization and expressed a willingness to negotiate further, but the Union failed to submit any new proposals and did not seek assistance of the Federal

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Service Impasses Panel. It is well established that an agency may implement in these circumstances, and does not violate the Statute by doing so. Id. See also U.S. Customs Service, 16 FLRA No. 31 (1984).2/ Accordingly, the complaint shall be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-20204 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ The General Counsel appears to argue that the following term in the parties' expired collective bargaining agreement required the Respondent to reach mutual agreement with the Union regarding steward assignments before implementing the planned reorganization: "When Station organizational changes result in a redistribution of personnel . . . the Employer and the Union will meet to readjust the number of stewards . . . . The degree of any necessary readjustment will be determined by mutual agreement."

Apart from other considerations, it is well established that a waiver will be found only if it can be shown that a party has clearly and unmistakably waived its statutory right, and it has not been shown here that the Respondent clearly and unmistakably waived its right to implement the planned reorganization following impasse. See, e.g., Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548 (1981) and Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 10 FLRA 172 (1982).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2761

Union

and

Case No. O-NG-419

U.S. ARMY ADJUTANT GENERAL
PUBLICATION CENTER, ST. LOUIS,
MISSOURI

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The issue presented is the negotiability of nine Union proposals.1/ Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

Section 2. Management Commitment

The employer will allocate all necessary resources to effectively administer the EEO Program and there will be criteria for staffing that will also assure effective performance in all program aspects, including affirmative action and processing of discrimination complaints.

1/ In its response to the Agency's statement of position in this case, the Union has requested that six additional proposals which it presented for decision in its initial petition for review be withdrawn from consideration. The Union's request is granted and those proposals will not be considered further herein.

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Managers and supervisors on all levels will fully support and participate in, as appropriate, all policies and programs and are responsible for meeting any goals and objectives established for full equal employment within their areas of jurisdiction.

Union Proposal 3

Section 5. EEO Counselors

The employer agrees to provide at [illegible]ctivity an adequate staff of trained EEO couns[illegible]s, who will be available and accessible to all employees, wherever their work stations.

In American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603, 615-19 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945, 102 S.Ct. 1443 (1982), the agency contended that certain proposals in dispute concerning management's establishment of comprehensive plans and programs to implement the agency's equal employment opportunity (EEO) policies and objectives did not concern "conditions of employment" within the meaning of section 7103(a)(14) of the Statute. In that decision, the Authority held, contrary to the agency's contentions, that the proposals concerned conditions of employment and thus were within the duty to bargain.

In this case, the Agency asserts that, as distinguished from the Wright-Patterson decision, Proposal 1 does not concern "conditions of employment" within the meaning of section 7103(a)(14). The Authority determines, contrary to the Agency's argument, that the proposal is similar to the proposals in Wright-Patterson and does concern conditions of employment for the reason stated in that decision. In this regard, the proposal would not require any particular actions by the Agency in furtherance of the proposed objective, i.e., supervisory and management participation, so as to be outside the duty to bargain. Cf. American Federation of Government Employees, AFL-CIO, Local 909 and Department of the Army, Headquarters, Military Traffic Management Command, Washington, D.C., 6 FLRA 502 (1981) (proposal concerning assessment of supervisors' performance and training does not concern "conditions of employment" pursuant to section 7103(a)(14)).

The Agency expressly concedes that it is obligated under Government-wide regulation to provide sufficient resources to administer its EEO program. However, the Agency disputes the negotiability of Proposals 1 and 3 insofar as they would establish a contractual obligation "independent of the regulatory requirement and which would continue even

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if the regulation were rescinded."2/ As to this argument, the Authority concludes, contrary to the Agency, that the proposals herein would not establish an independent contractual obligation but instead would simply implement the Agency's EEO program consistent with law.3/ In this regard, the proposals would provide generalized support for the EEO program. For example, Proposal 1 would provide for the allocation of "necessary resources to effectively administer the EEO program." The Union explains the proposal as follows:

> [T]he proposal merely requires a commitment to EEO, and in no manner does the proposal address itself to determining the way in which the agency will perform the particular activities by which it accomplishes its mission. [Footnote omitted.]

Proposal 3 would simply provide for "adequate" staffing, and, in our view, would similarly not require the Agency to allocate its resources in any particular way beyond that which is authorized by law.

As to the Agency's claims that the proposals violate management rights, the record does not establish that the proposals would prescribe the assignment of particular duties to certain employees or the establishment of new positions to perform EEO program-related duties. Consequently, the Agency has not shown that the proposals are inconsistent with management's rights to hire or assign employees pursuant to section 7106(a)(2)(A) or its right to determine the number of employees assigned pursuant to section 7106(b)(1) of the Statute.4/

2/ Agency Statement of Position at 2.

3/ In this regard, Exec. Order No. 11,478, 29 CFR 1613.201 (1984) provides as follows:

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

. . . . . .

Sec. 2. . . . It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner[.]

4/ Cf. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603, 622-23 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945, 102 S.Ct. 1443 (1982) (proposal requiring the assignment of EEO duties to particular employees would violate management's right under section 7106(a)(2)(B) to assign work to positions or employees).

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Rather, the proposals would provide for a general commitment to the Agency's EEO program in a manner which is substantially similar to the proposals held negotiable in Wright-Patterson. Accordingly, it is determined that the proposals are not outside the duty to bargain.

Union Proposal 2

Section 3. Personnel Actions and Employment Practices

All personnel actions and employment practices involving employees and applicants for employment will be based solely on law and the terms of this contract.

The duty to bargain established in the Statute extends to matters relating to "conditions of employment," i.e., personnel policies, practices and matters affecting working conditions of unit employees.5/ Under section 7103(a)(2) the term "employee" relevantly includes only individuals currently employed in an agency. It does not include individuals who are applicants for employment with an agency. Accordingly, insofar as the proposal would impose certain requirements on the Agency as to applicants for employment, the proposal, as alleged by the Agency, is not within the Agency's duty to bargain because it is not concerned with conditions of employment of unit employees within the meaning of section 7103(a)(14) of the Statute. Cf. American Federation of Government Employees, AFL-CIO, Local 2024 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA 125 (1983) (proposal benefiting former employees only if and when they are reemployed in bargaining unit positions concerns matters which are conditions of employment).

Insofar as it is applicable to employees, the proposal would provide that all personnel actions and employment practices of the Agency "will be based solely on law and the terms of [the parties'] contract" (emphasis added). In this connection, section 7117 of the Statute provides that the duty to bargain does not extend to proposals which are inconsistent with law or any Government-wide rules or regulations.6/ The Agency argues,

5/ See sections 7103(a)(12), 7103(a)(14) and 7114 of the Statute.

6/ That section provides, in pertinent part:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any

(Continued)

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in effect, that the proposal's requirement that its actions be based solely on law and contract is in conflict with this statutory provision. The Union states that this is not its intent. However, it is the Agency's interpretation of the proposal that is consistent with its express language. The proposal purports to enumerate the sole legal bases for judging the propriety of agency personnel actions and employment practices, and thereby excludes Government-wide rules and regulations. Accordingly, the Agency's contention that the proposal is not within the duty to bargain in this connection must be sustained.7/ If the Union were to revise its proposal consistent with its stated intent, the proposal would be within the duty to bargain. See, e.g., American Federation of Government Employees, AFL-CIO, Local 1533 and Naval Supply Center, Oakland, California, 8 FLRA 33, 34 n. 2 (1982). See also American Federation of Government Employees, Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 11 FLRA 608, 612-14 (1983) (Member Frazier, concurring).

Union Proposal 4

Section 6. Affirmative Action

. . . . . .

Utilization of Workforce Skills. The Employer will fully utilize the skills and potential of employees, especially those of lower-graded employees.

. . . . . .

In connection with efforts to correct underutilization and underrepresentation of minorities and women the employer will at least:

a. Identify and provide work opportunities commensurate with employee skills and potential, especially at the lower levels[.]

(Continued)

Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation. [Emphasis added]

7/ In this regard, the Authority has consistently held that it will not base a negotiability determination on a union's statement of intent which is inconsistent with the express language of the disputed proposal. See, e.g., National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA No. 18 (1984) at 2 n. 3 of decision.

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Union Proposal 4 expressly would require management to provide employees with opportunities to perform work commensurate with their skills and abilities. The proposal is identical to Proposal 3 in American Federation of Government Employees, AFL-CIO, Local 2263 and Department of the Air Force Headquarters, 1606th Air Base Wing (MAC), Kirtland Air Force Base, New Mexico, 15 FLRA No. 126 (1984). In that case, the Authority, relying on its decision as to "the last sentence of Article 10 section 9" in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983 (1982), remanded as to other matters, D.C. Cir. No. 82-2225 (Jan. 19, 1984), vacated by FLRA as to other matters, May 3, 1984, concluded that the proposal directly interfered with the agency's right, pursuant to section 7106(a)(2)(B) of the Statute, to assign work. Consequently, based on U.S. Customs Service, and the reasons and cases cited therein, Union Proposal 4 herein is outside the duty to bargain.

Union Proposal 5

Section 6. Affirmative Action

. . . . . .

Utilization of Workforce Skills.

. . . . . .

In connection with efforts to correct underutilization and underrepresentation of minorities and women the employer will at least:

. . . . . .

c. Designate a specific number of positions to be utilized to provide opportunities for employees to enhance their skills, perform at their highest potential, and advance in accordance with their abilities through results-oriented training programs.

Based on the Union's statement of its intent and the language of the proposal, the proposal would require the Agency to fill an undetermined, specific number of positions as upward mobility or training positions. In this regard, the proposal is substantially identical to the second sentence of the disputed proposal in National Treasury Employees Union and Internal Revenue Service, 2 FLRA 281 (1979), which would have required the agency to fill certain percentages of available vacancies as upward mobility positions. The Authority held that portion of the proposal directly interfered with management's right to assign employees under section 7106(a)(2)(A) of the Statute. For the reasons stated in

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that case, Proposal 5 herein is similarly outside the duty to bargain. See also American Federation of Government Employees, AFL-CIO, Council of Prison Locals and Department of Justice, Bureau of Prisons, 11 FLRA 286 (Provision 1) (1983).8/

Union Proposals 6-7

Section 6. Affirmative Action

. . . . . .

Utilization of Workforce Skills.

. . . . . .

In connection with efforts to correct underutilization and underrepresentation of minorities and women the employer will at least:

. . . . . .

[Proposal 6]

h. Permit individuals with physical or mental handicaps, chronic ailments, illnesses or injuries, and single heads of families who have dependents, to utilize sick or annual, or LWOP, to handle responsibilities for themselves and/or dependents. Supervisors will grant leave in all cases where the need is clearly documented on the request for leave, without undue pressure to the employee. [Only the underscored portion is in dispute.]

[Proposal 7]

i. Accommodations, including granting administrative leave, will be made to the religious needs of employees, including those who observe the Sabbath

8/ As to the Union's argument that the proposal incorporates the mandates of regulatory authorities, the proposal is outside the duty to bargain as substantively interfering with the exercise of management's rights under the Statute, notwithstanding the fact that the Agency may be required to implement such actions by outside rule or regulation. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981) (Proposals 1 and 2), affirmed as to other matters sub nom. National Federation of Federal Employees, Local 1167 v. FLRA, 681 F.2d 886 (D.C. Cir. 1982).

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on a day other than Sunday, when such changes can be made without undue adverse impact on the other employees.

Union Proposal 6 would require management to grant an employee's request for leave without regard to the necessity for that employee's service during the period covered by the request. In that regard, it is identical to the disputed portion of Proposal 4 in AFGE, Local 2263 and Kirtland Air Force Base, 15 FLRA No. 126 (1984). The Authority found that proposal, insofar as it involved the granting of annual leave, violated management's right to assign work pursuant to section 7106(a)(2)(B) of the Statute and, insofar as it involved the granting of sick leave, was inconsistent with 5 CFR 630.401, a Government-wide regulation. For the reasons more fully stated in that case, the Authority finds Proposal 6 herein to be outside the duty to bargain.

Union Proposal 7 would base the standard for granting administrative leave or other "accommodations" to the religious needs of unit employees upon the absence of undue adverse impact on other unit employees. It is identical to Union Proposal 5 in AFGE, Local 2263 and Kirtland Air Force Base, 15 FLRA No. 126 (1984). For the reasons stated with respect to that proposal therein, Union Proposal 7 violates management's right to assign work and also violates other law, i.e., 42 U.S.C. § 2000e(j), and is, therefore, outside the duty to bargain.

Union Proposal 8

Section 6. Affirmative Action

. . . . . .

The Employer will brief personnel and emphasize their responsibility for implementing established EEO goals and objectives through special staff conferences and supervisory/managerial development programs.

From the express language of the proposal and the Agency's understanding of its intent, which is not disputed by the Union, the proposal is chiefly concerned with the Agency's objectives in training and developing its supervisory and management personnel and the actions it will take to achieve such objectives. Accordingly, as it is concerned with such matters rather than either the representational rights of the exclusive representative or matters which directly relate to the conditions of employment of unit employees, it is not within the duty to bargain pursuant to section 7103(a)(14) of the Statute. American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 504 (1980).

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Union Proposal 9

Section 6. Affirmative Action

. . . . . .

The Employer will assure that all employees, recognized employee organizations, and applicants understand the EEO program. (Only underscored portion in dispute.)

The proposal is in dispute insofar as it provides that the Agency will assure that all applicants understand the EEO Program. As explained more fully in connection with Proposal 2, above, the duty to bargain pursuant to section 7103(a)(14) of the Statute, in conjunction with the definition of "employee" provided for in section 7103(a)(2) of the Statute, only extends to conditions of employment of unit employees. It does not extend to matters affecting applicants for employment. Accordingly, as the proposal is concerned with the Agency's actions as to applicants for employment, it is not within the Agency's duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review as to Union Proposals 2, 4, 5, 6, 7, 8 and 9 be, and it hereby is, dismissed.9/ IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1 and 3.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

9/ In so holding, the Authority finds it unnecessary to address the Agency's additional contentions as to the nonnegotiability of these proposals.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
COUNCIL 147

Union

and

Case No. O-NG-888

SOCIAL SECURITY ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues concerning the negotiability of six Union proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.1/

Union Proposals 1 through 5 - SSI Quality Statistical Log

1. The SSI quality statistical log will be used for training purposes only.

2. The SSI quality statistical log will not be used for TSR's appraisals as a means to evaluate quality and/or statistics on an individual basis.

1/ The Agency's contention that the Union's petition for review should be dismissed for failure to timely serve the head of the Agency cannot be sustained. In this respect, while the Union initially mailed a copy of its petition for review to the local Agency official who alleged that the proposals were nonnegotiable, the Regional Commissioner of the Social Security Administration and the Commissioner of the Social Security Administration, the Union subsequently served its completion of appeal on the Agency head's designee.

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3. The SSI quality statistical log will not be identified by any TSR's name or unit number.

4. The SSI quality statistical log will not cause any adverse action to TSR's performance.

5. If management wishes to gather statistical data for reports, it will be for the office as a whole. All statistics, as long as it does not show any individual performance, is acceptable.

Union Proposal 6 - Telephone Audit Sheet

Management will negotiate to establish a standard of what is a[n] Unsatisfactory Audit, Satisfactory Audit, Minimally Satisfactory Audit, Above Satisfactory Audit, and an Outstanding Audit for each of the TSR grade levels 4-7.

The disputed proposals in this case arose as a result of the Agency's Los Angeles Teleservice Center initially implementing a procedure for monitoring telephone calls between certain agency employees and the general public concerning Social Security matters. With regard to these proposals the Agency contends, without contravention by the Union,[2/] that higher level union and management officials in the Social Security-AFGE national consolidated unit have negotiated a national memorandum of agreement (MOA)[3/] concerning the telephone monitoring process in all Social Security teleservice centers including the Los Angeles Center represented by AFGE. Further, the Agency argues that, except for future changes to the telephone monitoring process, the MOA does not authorize additional negotiations at the local level on the monitoring process itself.[4/]

2/ The Union did not file a Reply Brief in this case.

3/ The Agency included with its Statement of Position a copy of the MOA and a form, entitled "Evaluation of Interviewing Practices," negotiated as a part of the MOA, to be used by supervisors in evaluating the telephone interviewing practices of Agency employees covered by the monitoring process.

4/ Item 26 of the MOA provides as follows:

In accordance with Article 4 of the Master Agreement and 5 USC 71, the Union will be notified of future changes to the

(Continued)

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The Authority finds that the Union Proposals herein are inconsistent with express provisions of the MOA and accompanying evaluation form. Specifically, in this regard, item 4 of the MOA provides as follows:

> The purpose of the Service Observation is to identify training needs, to provide a basis for retraining, to monitor the accuracy of information given, to improve employee performance, to provide information for performance appraisals and to gather information on the volume of types of calls received.

Consequently, Union Proposals 1 through 5, which would essentially permit the use of statistical data only for training or for general office purposes, are inconsistent with the MOA which provides that this information will be utilized in performance evaluations. Similarly, Union Proposal 6, which requires the negotiation of five performance levels in the telephone audit process, is inconsistent with the negotiated "Evaluation of Interviewing Practices" form which provides for only three levels of performance, namely, unsatisfactory, satisfactory and exceptional. Thus, the disputed Union proposals herein would require bargaining beyond that permitted in Items 26 and 27 of the MOA.

Hence, since there is no duty to bargain between the parties at the local level under the MOA, issues as to the negotiability of the disputed proposals herein under the Statute are not appropriate for resolution by the Authority. The Authority therefore concludes that the negotiability issues raised by the disputed proposals in the instant appeal are moot.

(Continued)

> Service Observation process. Management agrees to fulfill any obligation to bargain on those future changes in keeping with existing contractual and statutory authorities. Negotiations during the term of this Agreement to add to, amend or modify this Agreement may be conducted only by mutual consent of the parties.

Item 27 of the MOA provides as follows:

> Future changes in employee working conditions that are appropriate for bargaining that result from changes in the Service Observation process will be bargained at the level at which the change is initiated. The Administration will fulfill its statutory and contractual obligations pursuant to 5 USC 71 and the National Agreement.

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See National Federation of Federal Employees, Local 1979 and U.S. Forest Service, San Dimas Equipment Development Center, 16 FLRA No. 60 (1984) (Union Provision 4).

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, SEATTLE DISTRICT OFFICE
SEATTLE, WASHINGTON

Respondent

and

Case No. 9-CA-20160

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3230, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent and the General Counsel filed exceptions and cross-exceptions, respectively, to the Judge's Decision, and the Respondent filed an opposition to the General Counsel's cross-exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions, and recommended Order as modified below.

The Judge found that information was requested on February 4, 1982 by the Charging Party, hereinafter referred to as the Union, in connection with the anticipated filing of a grievance concerning the proposed removal of a unit employee for unsatisfactory performance, and that the Respondent violated section 7116(a)(1) and (8) of the Statute by its failure and refusal to provide this information from February 4, 1982 to February 19, 1982. In view of the voluntary settlement of the grievance, the Judge further found that any refusal after February 19, 1982 was not violative of the Statute.

Based on the facts found by the Judge, the Authority, in agreement with the Judge, finds that whatever "necessary" information had been requested by the Union on February 4, within the meaning of section

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7114(b)(4) of the Statute, was rendered moot on February 19 by the approval of the employee's disability retirement request and the cancellation of his proposed removal for unsatisfactory performance on that date. However, contrary to the Judge, the Authority also finds that the Respondent did not refuse to supply the information between February 4 and February 19. Rather, the Authority finds that the General Counsel has failed to meet the burden of proving that the Respondent failed or refused to comply with section 7114(b)(4) of the Statute in the circumstances of this case. In this regard, the Authority notes that the Union's request for information was lengthy; that the Respondent never refused to provide information sufficient to meet the Union's needs but rather asked, on February 10, */ that the Union's request be made reasonable and specific; that the Respondent had, as yet, no grievance against which to consider the Union's request for information; and that on February 12, the day after the grievance had been filed, the grievant and the Respondent entered into a settlement agreement which resulted in the Respondent's withdrawal of the proposed removal action, the subject of the grievance. In these circumstances, the Authority concludes that the Respondent did not unlawfully refuse to furnish necessary data to the Union between February 4 and February 19, 1982, and that the complaint in Case No. 9-CA-20160 must be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 9-CA-20160 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ The complaint herein alleged that the Respondent, on February 10, refused to provide the information requested by the Union and thereby violated section 7114(b)(4) of the Statute.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEATTLE DISTRICT OFFICE SEATTLE, WASHINGTON Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3230, AFL-CIO Charging Party	Case No.: 9-CA-20160

Nilda I. Aponte, Esquire
For the Respondent

Arthur E. Joyner, Esquire
For the Charging Party

Stefanie Arthur, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Nine, Federal Labor Relations Authority, San Francisco, California against the U.S. Equal Employment Opportunity Commission, Seattle District Office, Seattle, Washington (EEOC or Respondent), based on a charge filed by the American Federation of Government Employees, Local 3230, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent did engage in, and is engaging in, an unfair labor practice in violation of sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute). The complaint alleged that on or about February 10,

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1982, Respondent failed to comply with sections 7114(b)(4) by refusing to provide certain items of information requested by the Union. These items were allegedly reasonably available and necessary for full and proper discussion of the grievance of a bargaining unit employee.

Respondent's answer denied any violation of the Statute and contended, among other things, that the complaint is moot.

A hearing was held in Seattle, Washington. The Respondent, Charging Party, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record,[1/] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material herein, the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO has been certified as the exclusive representative of an appropriate nationwide unit of professional and nonprofessional employees of the Equal Employment Opportunity Commission (EEOC), including the employees at Respondent, Seattle District Office.

At all times material herein, a collective bargaining agreement has been in effect between the Council and the EEOC. (Joint Ex. 1). By the terms of Article 39, the Council is permitted to designate local stewards and the EEOC agrees to recognize the representatives designated by the Council. Arthur Joyner is the Chief Steward for AFGE Local 3230 representing employees at Respondent, one of the EEOC District Offices referred to in Article 39. (Tr. 20).

On or about December 2, 1981, Respondent notified Juan Sanchez of a proposal to remove him from his position as a GS-13 trial attorney. Thereafter, and in accordance with the provisions of the collective bargaining agreement, oral and written presentations were submitted by, and on behalf of, Mr. Sanchez. (General Counsel's Ex. 2).

In the course of the proceedings to remove Mr. Sanchez, a dispute developed over who would represent him in the proceedings. Mr. Sanchez had retained the services of a private attorney and, in addition, had designated Union Steward Arthur Joyner as his representative pursuant to Article 24 of the collective bargaining agreement. Respondent insisted that Sanchez was entitled to only one representative and refused to

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[1/] The General Counsel's motion to correct the transcript is granted; the transcript is hereby corrected as set forth therein.

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acknowledge his selection of both a Union representative and private counsel.[2/] The Union insisted that it was representing Mr. Sanchez concerning "administrative, contractual or procedural matters" and that Mr. Sanchez's attorney was representing him concerning his "legal rights under Title 7 or any other statute." (Tr. 42-44). Both representatives were involved in discussions with management concerning the proposed removal. During the course of these discussions, Mr. Joyner indicated that if a decision to remove were issued, an extensive grievance would be filed. (Tr. 22).

On January 22, 1982 Respondent issued a decision to remove Sanchez from his position effective February 12, 1982. Both the Union and Mr. Sanchez's attorney were sent copies of the decision. (General Counsel's Ex. 2).

By a three page memorandum dated February 4, 1982 to District Director Donald W. Muse, subject "First Request for Information Regarding The Pending Grievance of Juan J. Sanchez," Union representative Joyner requested 21 items of information. These items fell generally into the categories of requests for information regarding persons contacted and other transfers and assignments considered for Sanchez and others (Items 1-3, 21), disciplinary information concerning Sanchez and others (Items 4, 7-10, 15-16, 20), medical information and physicians consulted concerning Sanchez (Items 5, 6), leave policies (Items 11, 12), evaluations of Sanchez and others (Items 13, 19), and training information concerning Sanchez (Items 14, 17, 18). Generally, information was requested for the three year period of January 1, 1979 to February 4, 1982. (General Counsel's Ex. 4).

By letter dated February 10, 1982 District Director Muse responded to Mr. Joyner, in part, as follows:

> EEOC does not recognize the requirements of discovery or interrogatory in the administrative grievance procedure. This procedure is not in the judicial process. Your request appears to be of this nature.
>
> If you require information to assist you in carrying out your representative function, we will consider furnishing it, provided it is reasonable, specific or required by the Collective Bargaining Agreement. (General Counsel's Ex. 5).

[2/] Article 24g(b) of the collective bargaining agreement provides, among other things, that a schedule A attorney shall be notified of his right "to be represented by the Union or another representative of the employee's choice." (Joint Ex. 1, p. 43).

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At the time Mr. Muse responded to the letter no grievance had been filed; however, Mr. Muse knew that the termination was hotly contested and that the Union was contemplating filing a grievance. (Tr. 60, 75). Sanchez had also filed several EEO charges in connection with the proposed dismissal. The details concerning the EEO charges are not reflected in the record. (Tr. 71-72).

On February 11, 1982 Union representative Joyner filed a grievance directly with the Acting Chair, EEOC in Washington, D.C. in accordance with the expedited procedure contained in Article 46f of the agreement. Mr. Sanchez was identified and signed as the grievant and Mr. Joyner as the Union steward. The nature of the discipline was identified as "termination" and the "corrective action requested" was reinstatement, backpay, transfer, expungement of records, and counseling and training, as appropriate. Multiple issues were identified in a 22 page attachment. The eight general areas of contention were: Denial of Representative, concerning Respondent's refusal to recognize Joyner as the Union representative of Juan Sanchez during adverse action proceedings, as well as interference with Sanchez's right to select his representative, and failure to meet with the Union representative concerning the conditions of employment of Sanchez, all in contravention of various delineated sections of the collective bargaining agreement; Failure to Train the grievant in contravention of EEOC Orders and the collective bargaining agreement; Failure to Counsel or Provide Counseling to the grievant concerning mental and emotional problems, in contravention of the collective bargaining agreement and federal law; Failure to Provide Reasonable Work Conditions for the grievant, in contravention of Articles 4(f) and 46(a) of the collective bargaining agreement; Failure to Consider Mitigating Circumstances concerning the grievant, in contravention of Article 24(a) of the collective bargaining agreement; Failure to Minimize Action toward the grievant with less severe action as required by Article 24 of the collective bargaining agreement; Discrimination of the grievant based upon national origin, age, race, sex and in retaliation for the exercise of protected rights, in contravention of Article 8(a) of the collective bargaining agreement; and finally, the contention that Management's Notice of Proposal to Remove failed to contain in the record a number of responses of the grievant. (General Counsel's Ex. 3).

On February 12, 1982 Sanchez and his attorney, John Beckwith, signed a document entitled "Agreement" which provided, among other things, that Sanchez's removal would be delayed until March 12, 1982, in order to allow for the processing of a request by Sanchez for disability retirement. The document provided that if the application for disability retirement were approved by OPM prior to March 12, 1982, the "parties to this agreement, specifically Juan Sanchez and the Union waive all rights to future appeals to the MSPB, through the negotiated grievance procedure, and withdraw any and all charges of race, national origin, handicap, sex and age discrimination. . . ." The document also provided that if Sanchez's application for disability retirement were approved, EEOC "agrees not to include adverse action documents in the official personnel file of Juan

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Sanchez." The document was signed by the Regional Attorney and District Director Muse for the EEOC and by Juan Sanchez. John Beckwith signed the agreement as "Attorney - legal representative" for Sanchez. Union representative Joyner refused to sign the document, and the line originally designated for the Union's signature was stricken. Joyner stated that the Union did not consider the agreement a waiver of any rights that the Union had either as an institution and representative of the bargaining unit or to issues in the grievance. (Respondent's Ex. 2; Tr. 43-44).

Sanchez's disability retirement was approved by OPM on February 19, 1982 and became effective on March 12, 1982. An official notification of personnel action was issued by Respondent to reflect his retirement on account of disability as of that date. (Respondent's Ex. 1).

On February 23, 1982 Union representative Joyner amended Mr. Sanchez's grievance to add the remedy that should Sanchez, subsequent to his retirement, become fit for duty, that he be offered reinstatement to the position of GS-13/10 trial attorney in San Francisco. The cited reason for the amendment was that the earlier decision to terminate Mr. Sanchez was on record and would be a severe obstacle to his reinstatement. (General Counsel's Ex. 6).

Respondent denied the original grievance on March 11, 1982 and the amended grievance on March 22, 1982 on the basis that Mr. Sanchez's disability retirement had been approved and, therefore, Mr. Sanchez and his legal representative had waived the right to grieve the adverse action through the negotiated grievance procedure. Respondent also noted that the grievance was over Mr. Sanchez's termination, an action which was not, and would not be, taken in view of the approval of his retirement. (General Counsel's Ex. 7, 8).

The Union referred the grievance to arbitration pursuant to the collective bargaining agreement. The appointment of an arbitrator is pending. (Tr. 28).[3/] Article 48, section h of the collective bargaining agreement provides:

3/ Respondent presented testimony purporting to show that the grievance has been terminated. Ms. Godwin testified that, in August 1982, Gwen Jones of her office sent a letter to the Local president advising that if the Union did not contact the Agency to strike for an arbitrator within 5 days, the Agency would terminate the grievance; and that, since no contact was made as required, the agency had terminated the grievance. (Tr. 87-88). I am unable to find that the grievance has been effectively terminated based on this testimony. The collective bargaining agreement covers the situation where a party unduly delays the selection of an arbitrator. The case is not terminated or dismissed in such circumstances. Rather, Article 48, section C requires that the other party return the list with its order of preference to the FMCS "for selection of the available arbitrator." (Joint Ex. 1, p. 75).

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> Absent a negative arbitrator's decision on the arbitrability of a grievance, the arbitrator shall hear arguments regarding both the arbitrability and the merits of the case at the same hearing. However, the parties may mutually agree otherwise in instances where such highly complex cases would involve several days of hearings. (Joint Ex. 1, p. 76).

Discussion, Conclusions, and Recommendations

The Authority has previously held that section 7114(b)(4) of the Statute requires management to furnish a union with information which would enable the union to effectively carry out its representational obligation during the processing of an employee grievance. U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA No. 47 (1982).

The information was specifically requested "regarding the pending grievance of Juan J. Sanchez." Although no grievance had been filed at the precise time of the Union's request, Respondent was fully aware of the Union's representational role and of potential grievance issues. There was a clear nexus between much of the information sought and these issues. It is concluded that the information requested in Items 4 (limited to Seattle office), 5, 11-15 (excluding actions "considered") and 16-21 (excluding "handicap") was necessary and relevant in order to properly process the employee's grievance at that time. Respondent's defenses, concerning lack of specificity, election of other remedies, and Privacy Act considerations, are not supported by the record. Accordingly, it is concluded that Respondent violated sections 7116(a)(1) and (8) of the Statute, by its refusal to provide this information during the period from February 4, 1982 to February 19, 1982.

The General Counsel and the Charging Party contend that since the Union has taken the grievance to arbitration, the grievance is alive, and there is a continuing duty to supply the information. These parties also assert that the effect of the February 12, 1982 agreement on the Union's right to pursue the grievance is an arbitrability question to be submitted to an arbitrator for resolution and is not appropriate for disposition here. Respondent maintains that the agreement had the effect of waiving Mr. Sanchez's rights through the negotiated grievance procedure, and the Union has no separate rights which survived the agreement which would make the information relevant to the Union's representational duty.

The question of the effect of the February 12, 1982 agreement on the Union's right to pursue the grievance is indeed an arbitrability question for resolution by the arbitrator. See Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA No. 80 (1983). However, the effect of the February 12, 1982 agreement on the alleged unfair labor practice must be considered here; that is, whether, in light of the agreement, Respondent had a continuing duty to provide information to the Union which was relevant and necessary to process the grievance of

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the bargaining unit employee. The case of U.S. Customs Service, Region VII, 10 FLRA No. 47 (1982), cited by the General Counsel, is not controlling here. In U.S. Customs Service the Authority rejected the agency's contention, inter alia, that it had no duty to furnish requested information because the employee's grievance involved a matter which was nongrievable under the parties' negotiated agreement. The Authority pointed out that arbitrability questions are to be submitted to arbitration, unless otherwise agreed, and found a violation for the conceded refusal to furnish necessary and relevant information. U.S. Customs Service did not involve an alleged waiver. Cf. Department of the Navy, Portsmouth Naval Shipyard, 4 FLRA No. 82 (1980).

If the Respondent is correct, there ceased to be a grievance as a result of the compliance with the February 12, 1982 agreement, and the Union thereafter had no continuing right to process such a grievance. Thus, the requested information would no longer be relevant and necessary to process "the grievance of a bargaining unit employee," as alleged. The dispute as to the effect of the February 12, 1982 agreement on the Union's rights will be a threshold issue for the arbitrator and would best be resolved through that forum. Otherwise, conflicting interpretations of the agreement might result. Inasmuch as Respondent's interpretation is arguably within the terms of the negotiated agreement and the February 12, 1982 agreement, its failure to furnish the information after February 19, 1982 (the date of approval of Sanchez's disability retirement) did not rise to the level of an unfair labor practice.4/ Cf. United States Army Aviation Center, Fort Rucker, Alabama, 1 FLRA No. 98 (1979); Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA No. 90 (1983).

Assuming, however, that the continuing obligation of the Respondent to furnish the information is properly the subject of this unfair labor practice complaint, the record will be considered further on that basis. Cf. Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 3 FLRA No. 82 (1980). It is noted that Sanchez and his attorney, by means of the February 12, 1982 agreement, agreed, in effect, not to pursue a grievance or other avenues of appeal concerning his proposed removal if OPM approved his request for disability retirement. In turn, EEOC agreed to withdraw the proposed removal from his personnel file if the request were approved. Sanchez's request for disability retirement was approved by OPM on February 19, 1982. There is no indication in the record that the agreement is invalid, that EEOC has not complied with its part of the agreement, or that Mr. Sanchez is in any way dissatisfied with the agreement or its results.

4/ If the arbitrator decides the arbitrability issue in favor of the Union and reaches the merits of the grievance, a request for the information may be reasserted at that point.

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The Union took no part in the agreement and desires to have the information in issue in order that it might pursue the grievance. However, in my view, the agreement and compliance with it makes the alleged continuing need for the information moot. The complaint specifically alleged that the information was "necessary for full and proper discussion of the grievance referred to in paragraph 11 above ["the grievance of a bargaining unit employee"]. The information was not requested by the Union qua Union in order to fulfill its bargaining responsibilities. Pursuant to the February 12, 1982 agreement Sanchez ceased to be pursuing a grievance as of February 19, 1982 or to be a bargaining unit employee after March 12, 1982. Thus, after February 19, 1982, the requested information was not relevant and necessary in order to process the grievance of a bargaining unit employee, as alleged. There was no continuing violation after that date. An order operating prospectively will adequately remedy the violation found.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the U.S. Equal Employment Opportunity Commission, Seattle District Office, Seattle, Washington shall:

1. Cease and desist from:

(a) Failing and refusing to furnish to the American Federation of Government Employees, Local 3230, AFL-CIO, upon request and, to the extent not prohibited by law, data which is reasonably available and necessary to enable the exclusive representative to perform its representational obligations to a unit employee.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request, and to the extent not prohibited by law, furnish to the American Federation of Government Employees, Local 3230, AFL-CIO, data which is reasonably available and necessary to enable the exclusive representative to perform its representational obligation to a unit employee.

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(b) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region Nine, Federal Labor Relations Authority, San Francisco, California, in writing, within 30 days form the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 13, 1983
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We Hereby Notify Our Employees That:

WE WILL NOT fail and refuse to furnish to the American Federation of Government Employees, Local 3230, AFL-CIO, upon request and, to the extent not prohibited by law, data which is reasonably available and necessary to enable the exclusive representative to perform its representational obligations to a unit employee.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, and to the extent not prohibited by law, furnish to the American Federation of Government Employees, Local 3230, AFL-CIO, data which is reasonably available and necessary to enable the exclusive representative to perform its representational obligation to a unit employee.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region Nine, whose address is: 530 Bush Street, Room 542, San Francisco, California 94108, and whose telephone number is: (415) 556-8106.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL COUNCIL OF SSA FIELD
OPERATIONS LOCALS, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

and Case No. O-NG-873

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and

NATIONAL COUNCIL OF SSA FIELD
OPERATIONS LOCALS, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

and Case No. O-NG-891

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

CONSOLIDATED DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petitions for review in these cases[1/] come before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and raise an issue regarding the negotiability of two similar Union proposals. Upon

1/ The Authority, pursuant to a request by the parties, has consolidated these two cases because the proposals involved are similar and present the same negotiability question.

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careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

All OFO employees in Region III will have an additional 20 minutes paid time for banking purposes on pay days.

Union Proposal 2

All employees in Region III will be excused and paid for 20 minutes immediately preceeding or following the unpaid lunch period.

The record indicates that the Union sought negotiations over the disputed proposals following the Agency's decision to terminate a long standing practice of routinely granting certain employees in Region III 15 minutes of administrative leave in addition to a half hour unpaid lunch period. Union Proposal 1 would give employees 20 minutes of paid time on pay days, and the record indicates that such time is intended to be appended to the lunch period. Union Proposal 2 would give employees 20 minutes of paid time immediately preceeding or following the lunch period on a daily basis. In this regard, the Union proposals herein are to the same effect as the union proposal found to be outside the duty to bargain in American Federation of Government Employees, AFL-CIO, Local 3231 and Department of Health and Human Services, Social Security Administration, 17 FLRA No. 83 (1985). In that decision, the Authority held that a proposal which would have attached a paid break to an unpaid lunch period was nonnegotiable because it conflicted with 5 U.S.C. § 6101[2/] as interpreted in Comptroller General Decision B-190011

2/ 5 U.S.C. § 6101 provides in pertinent part as follows:

(2) The head of each Executive agency, military department, and of the government of the District of Columbia shall--

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that--

(Continued)

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(December 30, 1977). Similarly, the proposals at issue herein would require the Agency to append a paid break to the unpaid lunch period for the purpose of extending the lunch period. Thus, for reasons set forth in American Federation of Government Employees, AFL-CIO Local 3231 and Department of Health and Human Services, Social Security Administration, the Authority concludes in agreement with the Agency that the Union proposals are inconsistent with law, 5 U.S.C. § 6101, and are outside the duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulation, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.3/

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

3/ In view of the decision herein, it is unnecessary to address the Agency's additional contentions.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES GOVERNMENT PRINTING OFFICE
PUBLIC DOCUMENTS DISTRIBUTION CENTER
PUEBLO, COLORADO

Respondent

and

Case No. 7-CA-659

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3392

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent had not engaged in another unfair labor practice alleged in the complaint and recommended dismissal of that portion of the complaint. Exceptions to a part of the Judge's Decision were filed by the Respondent, and the General Counsel filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record in this case, the Authority hereby adopts the Judge's findings and conclusions only to the extent consistent herewith.

The Judge concluded that the Respondent failed to comply with section 7114(a)(2)(A) of the Statute when it did not provide the Union with an opportunity to be represented at a meeting on July 10, 1980, between the first level supervisor of the Receipts and Verification Unit (Dorene Van Dover) and the four Verification employees, inasmuch as the meeting

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was in his view a formal discussion.1/ In so concluding, the Judge found that the meeting in question was "formal" in nature, and that the subject matter of the meeting came within the meaning of section 7114(a)(2)(A) of the Statute as required. The Authority disagrees.

In a subsequently issued decision, Bureau of Government Financial Operations, Headquarters, 15 FLRA No. 87 (1984), appeal docketed sub nom. National Treasury Employees Union v. FLRA, No. 84-1493 (D.C. Cir. Oct. 1, 1984), the Authority reiterated that in order for a union's right to be represented under section 7114(a)(2)(A) to attach, "all elements set forth in that section must be found to exist: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more employees in the unit or their representatives;2/ (4) concerning any grievance or any personnel policy or practices or other general conditions of employment."

Under the facts presented, the Authority concludes that no formal discussion took place because the final element reviewed above is not manifest. With regard to the final element, in finding that the subject matter of the July 10 meeting concerned "any personnel policy or practices or other general condition of employment" within the meaning of section 7114(a)(2)(A) of the Statute,3/ the Judge stated at pages 9 and 10 of his Decision:

1/ Section 7114(a)(2)(A) of the Statute provides:

> § 7114. Representation rights and duties
>
> . . . . . .
>
> (a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

2/ As there appears to be no dispute that the meeting was a discussion between representatives of the agency and bargaining unit employees, the Authority concludes that elements 1 and 3 have been met.

3/ No party alleged, and it does not appear, that the meeting concerned a grievance within the meaning of section 7114(a)(2)(A) of the Statute.

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> [T]he record clearly indicates that through discussion initiated by Van Dover, there was an unsuccessful attempt to gain voluntary employee acceptance of a significant change in the method of reporting "nonproductive" or "unmeasured time" on the back of the Verification Production Report. The discussion also involved an inquiry into the reasons underlying the high productivity of Verification employees, and statements by Van Dover as to the potential future impact of high productivity levels on Verification employees. She noted that if the employees continued to exceed production standards they would be detailed out more frequently in the future, and that if Verification employees did continue to exceed high production levels, there conceivabily (sic) could be some impact on the number of positions in the Unit.

The record reflects that the Public Documents Distribution Center in Denver, Colorado employs over eighty employees in conducting the mail order distribution operation for the Respondent. Van Dover supervises the Receipts and Verification Unit of the Mail Order Processing Section at the Center. Included among the employees supervised by Van Dover are the four employees of the Verification Area with whom she met on July 10, 1980.

In Bureau of Government Financial Operations, supra, the Authority clarified further the meaning of the phrase "concerning any grievance or any personnel policy or practices or other general condition of employment," contained in section 7114(a)(2)(A) of the Statute. In this regard, as relevant herein, the Authority concluded, in discussing the meaning of "any personnel policy or practices," that such policies and practices involve "general rules applicable to agency personnel, not discrete actions taken with respect to individual employees." Further, in discussing the meaning of "other general condition of employment," the Authority concluded "that formal discussions are limited to those discussions (except grievance meetings) 'which concern conditions of employment affecting employees in the unit generally.'" (footnote omitted)

In applying these considerations to the facts in the instant case, the Authority concludes, contrary to the Judge, that the subject matter of the meeting did not involve "any personnel policy or practices," or "other general condition of employment," within the meaning of section 7114(a)(2)(A) of the Statute. The discussion did not involve conditions of employment affecting employees in the unit generally, but instead concerned the manner in which four specific employees in one small subcomponent of the Respondent's operations were reporting their productivity. Thus, the discussion constituted no more than a routine monitoring function by management. No other employees in the Receipts and Verification Unit supervised by Van Dover, or anywhere else within the Public Documents Distribution Center, were involved in or affected by the particular inquiry concerning the reporting of productivity by the

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four employees at the meeting. Moreover, any further discussion that ensued at the meeting concerning future details and staffing levels if productivity levels remained excessively high was speculative in nature and did not involve any specific personnel policies or practices of the Respondent. Therefore, the Authority concludes that the subject matter of the July 10 meeting did not involve a grievance or any personnel policy or practice or other general condition of employment -- at least one of which must be present as a prerequisite for finding that the subject matter of the discussion falls within the purview of section 7114(a)(2)(A) of the Statute.

Accordingly, the Authority concludes that the July 10 meeting was not a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute inasmuch as the meeting did not concern subject matter within the purview of section 7114(a)(2)(A).4/ It follows, therefore, contrary to the conclusion of the Judge, that Respondent's failure to provide the Union with an opportunity to be represented at the July 10 meeting was not violative of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-659 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ In view of this finding, the Authority does not decide whether the meeting was formal (element 2).

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET NW.
WASHINGTON, D.C. 20036

UNITED STATES GOVERNMENT PRINTING OFFICE PUBLIC DOCUMENTS DISTRIBUTION CENTER PUEBLO, COLORADO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3392 Charging Party	Case No. 7-CA-659

Neal Fine, Esquire
Robert F. Green, Esquire
For the Respondent

Gavin K. Lodge, Esquire
For the General Counsel

Mr. Michael R. Hudson
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. §7101, et seq., (hereinafter referred to as "the Statute") and the rules and regulations issued thereunder.

The complaint as amended at the hearing alleged that on or about July 10, 1980, the Respondent, acting by and through Mrs. Dorene Van Dover, a Supervisory Supply Technician, at Respondent's Pueblo, Colorado

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facility, violated Sections 7116(a)(1), (5) and (8) of the Statute by conducting a formal discussion with bargaining unit employees concerning personnel policies, practices and other general conditions of employment, as described in Section 7114(a)(2)(A) of the Statute, without affording the Charging Party (hereinafter also referred to as "the Union") an opportunity to be represented at such discussion. The amended complaint also alleged that on or about the same date, the Respondent, acting by and through Mrs. Van Dover, violated Sections 7116(a)(1) and (5) of the Statute by unilaterally changing terms and conditions of employment when Mrs. Van Dover changed requirements "for the reporting of non-productive time" without giving the Union notice of the change and affording the Union an opportunity to bargain.1/

Counsel for the Respondent argues that the meeting convened by Mrs. Van Dover was not a "formal discussion" within the meaning of Section 7114(a)(2)(A), and further that no unilateral change in the terms and conditions of employment occurred.

The parties were represented by counsel during the hearing, and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Post-hearing briefs were received from counsel representing the General Counsel and counsel representing the Respondent. These have been duly considered.2/

1/ During the course of the hearing "non-productive time" was referred to as "unmeasured time," or time not directly associated with production work performed by the unit.

2/ Counsel for the Respondent moved to correct the hearing transcript as follows:

Page	Line	Change	To
26	5	3 FLRA 687	3 FLRC 697
163	6	manage side	manninng

Under authority provided in Section 2423.19(r) of the Regulations, 5 C.F.R. §2423.19(r), the motion to correct is granted. The following additional corrections are also made in the hearing transcript:

Page	Line	Change	To
41	24	objection	Jenck's Act
119	9	Union	Unit

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Findings of Fact

General Information Pertaining to Center Operations

The Public Documents Distribution Center conducts a mail order distribution operation for the Government Printing Office and other United States government agencies.[3/] Work is performed by approximately eighty-two permanent employees. In 1980, the Center distributed four and one half billion pieces of mail. Since 1977, the Center has utilized formal production standards to project work loads, and to justify positions (Tr. 157). Production standards are based on prior production figures of employees doing the same type of work in a unit (Tr. 157-158).

Mrs. Van Dover, a supervisor in the Center's Mail Order Processing Section, was in charge of the Receipts and Verification Unit of the Section. The Receipts and Verification Unit was housed in one room which in turn was divided into a Receipts area and a Verification area. The Receipts area employees received all paid orders for publications and processed the orders into batches. The batches of paid orders were then received in the Verification area for further processing.

Productivity was a special concern of Center management and production employees were required to fill out production reports. Employees in the Verification area executed Verification Production Reports daily (Tr. 30, Jt. Exh. 1). Verification Production Reports were quite detailed and employees were required to account for their time. Specific types of work activity were described and activities not directly related to production were also identified, but in more general terms. The latter category, described in large measure as "unmeasured time," pertained to activity not relating directly to work performed by Verification employees (Tr. 51-52).

The Mail Order Processing Section was required to file Manpower Utilization Reports based in part upon data collected in Verification Production Reports[4/] submitted by Verification employees. Production standards imposed on employees in the Receipts and Verification Unit have gone up since 1977, and employees assigned to the Unit have been expected to perform more work as a result (Tr. 158).

3/ The Center bids on mail order distribution contracts offered by government agencies on a competitive basis and performs distribution services for such agencies under the terms of contracts negotiated.

4/ The Manpower Utilization Report reflected the productivity of the Section, and not individual employee productivity.

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Managements Concern Relating to Tendency of Verification Employees to Exceed Production Standards, and Events Leading to July 10, 1980 Meeting.

About two weeks prior to July 10, 1980, Van Dover invited the attention of the Chief of the Mail Order Processing Section to the fact that Verification employees were frequently meeting and exceeeding one hundred percent of production standards relating to Verification area work (Tr. 38, 56). A total of four employees in the Receipts and Verification Unit were involved. These were Jackie Mitts, Mary Lou Apodaca, Lucille Hernandez[5/] and Nanette Christenson. Robert Sykes, Chief of the Section requested Van Dover to convene a meeting of Verification area employees to discuss the accuracy of Verification Production Reports (Tr. 67). At the time Sykes was engaged in a study of production standards on behalf of management as management was considering an increase in production required of employees. Accuracy in production reporting was deemed essential in order for Sykes to perform the task of recommending production standards (Tr. 68).[6/] It was established that Sykes was concerned over the fact that Verification area employees were exceeding one hundred percent of their standards, and he felt that something "could be wrong in the reporting of the [sic] time" by Verification employees (Tr. 68, 76). Sykes had previously submitted proposed production standards, but management had asked him to "refigure" his proposal and to provide "another set of figures" (Tr. 153).

It was made clear that management's concern relating to the consistently high productivity was the reason for convening the meeting (Tr. 28, 31). Each time that it happened management was required to provide a narrative explanation in the Manpower Utilization Report (Tr. 28-29). Van Dover testified that prior to the July 10, 1980 meeting it was her intention to discuss Verification's record of exceeding standards with Verification employees (Tr. 29). This discussion was contemplated as background for management's interest in assuring the accuracy of employee production reports (Tr. 123).

July 10, 1980 Meeting

Van Dover convened the meeting of the four Verification area employees on July 10, 1980 (Tr. 130). The meeting lasted about one hour (Tr. 38-39). Mary Lou Apodaca, one of the four employees was summoned

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5/ This individual is referred to in the record as Lucille Hernandez and Priscilla Hernandez. Her correct name was finally reported as Lucille Priscilla Hernandez.

6/ The Manager of the Center had the Authority to set standards and Sykes had authority to recommend changes (Tr. 158).

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back to the area from a detail by Van Dover, so that all Verification employees could attend the meeting (Tr. 29-30). The Union was not notified of the meeting in advance (Tr. 41).7/

Van Dover began the meeting by noting that the Verification segment of the Unit was consistently exceeding production standards imposed by management, and that she did not know whether the standards were set too low (Tr. 120). She indicated that management wanted to know why employees were consistenly exceeding the standards (Tr. 86).8/ As a result of the discussion concerning the high productivity of Verification area employees, one employee suggested that perhaps the standards were not high enough (Tr. 89, 131), at which point Van Dover responded by saying that she had been unsuccessful in efforts to persuade higher management officials to increase the standards (Tr. 89, 114). Van Dover's comments concerning high productivity also generated other employee comment as to the reasons for Verification's high performance (Tr. 120-121).

Van Dover's main topic of discussion related to management's need for accuracy in reporting productivity on Verification Production Reports. She generated a discussion of the methodology utilized by the employees to compute and record time assigned by them to activities identified in the report (Tr. 33). The following testimony elicited from Van Dover by counsel for the General Counsel indicates the nature of the discussion:

> Mr. Lodge: You talked also didn't you?
>
> Mrs. Van Dover: I listened too.
>
> . . . .
>
> Mrs. Van Dover: I wanted to hear their ideas and I wanted to know what's wrong here with the time recording? Are we all doing the same thing?

7/ Although a Union steward was in the room where the meeting was held, the steward was not notified in advance and did not overhear what was discussed by those in attendance (Tr. 136).

8/ Although Van Dover testified that she could not recall bringing up the subject of employees exceeding production standards relating to Verification work, the record is clear that she intended to mention this fact and that she did mention this at the meeting. It was also brought out that it was common knowledge that the group was then exceeding productivity standards (Tr. 123, 132).

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Mr. Lodge: Why was the unit exceeding production?

Mrs. Van Dover: True, I wanted to know if we were all recording it in the same way. (Tr. 33-34).

Some employees exhibited their logbooks or notebooks to indicate their method of preparing data for the Report (Tr. 37, 58-59). Van Dover stated: "I really wanted to know how they kept track of their time .... So I was concerned. I felt it was my concern" (Tr. 70-71). At another point she stated that the meeting was designed to review the methodology used to gather figures for the Verification Production Report (Tr. 83).

In large measure the meeting was designed to produce ideas for improving the accuracy of the Report (Tr. 83, 133). However, at least one employee, Jackie Mitts, perceived the inquiry as a possible management suggestion that reports were being falsified. Mrs. Van Dover denied this, but indicated that it was management's intent to make their reports more accurate (Tr. 97).

A considerable portion of the discussion related to the treatment of "unmeasured time," or time not directly associated with production because "it was easy to use unmeasured time (as a) catchall for any extra time we might not be able to account for...." (Tr. 89, 149-150).9/ Although no new production standards were imposed upon Verification area employees, and although employees were not ordered to change their method of reporting "non-productive time" or "unmeasured time," Van Dover did explore new methods of calculating and presenting such time on the Verification Production Report, and suggested to employees that they might keep an accurate accounting of unmeasured time on the back of the Verification Production Report instead of recording amounts of such time without further explanation (Tr. 124). However, when May Lou Apodaca indicated that she wanted to keep such information in her own personal notebook, Van Dover indicated that this would be acceptable to management (Tr. 124-125).

Van Dover's suggestion was in fact erroneously perceived as a directive by Jackie Mitts, who began to detail in more specific terms on the back of the Report, exactly how she utilized "unmeasured time" (Tr. 90, 98-99, 103-104). However, the record clearly indicated that reporting in a more detailed manner was strictly voluntary and not

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9/ Work in this category included activities relating to union work, worker safety, women's programs, welfare, and equal employment opportunity matters (Tr. 51-52, 149-150).

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mandated (Tr. 37, 59, 84, 124-125, 133, 151). There was no showing that Verification area employees were required to change their method of reporting time, or that, except for volunteers, employees ever did report their utilization of time in more detail.

During the course of the meeting management concern over the high productivity record of Verification employees led to employee speculation as to whether the Unit would lose a position, speculation as to who would be transferred out, and/or whether there would be an increase in the detailing of employees (Tr. 34-35, 59, 88, 109, 115, 122). Van Dover noted that a position would not be "affected at this time," (Tr. 34), and said that a smaller unit was not then being planned (Tr. 59-60). However, she acknowledged that it was possible that continuation of the group's consistently high productivity could lead to reduction in the size of the unit, the transfer of personnel, or an increase in detailing (Tr. 88, 109, 115). However, Van Dover indicated that it was much more likely that there would be an increase in the practice of detailing employees out of Verification to help in other work areas (Tr. 36, 65, 121-122, 125, 127, 130-131, 152, 154). The record disclosed that Verification area employees were ordinarily detailed out by Van Dover to the Order Preparation Unit or to warehouse work on an equitable basis involving volunteers or selection from a roster. Details were considered undesirable by bargaining unit members in many cases (Tr. 77-78).

A portion of the discussion during the course of the meeting related to comments made by Jackie Mitts with respect to her complaint that Verification area employees should be commended for their productivity rather then accused, and with respect to her inquiring whether management was in fact requesting that Verification employees slow down and produce less. Van Dover denied that the meeting was convened to accuse them or to effect a slow down in their work. She insisted that the meeting was convened to "assist them in recording their time properly" (Tr. 36-37), and said that there had to be a reason for consistently exceeding one hundred percent of their standards (Tr. 87).10/

Discussion and Conclusions

Section 7114(a)(2)(A) of the Statute provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -

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10/ The record reflected no indication whatsoever that the Respondent was encouraging a slow down. If anything, the evidence shows that the opposite result was intended.

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> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment....

Although there is little or no case law specifically construing the provisions of Section 7114(a)(2)(A), cases construing Section 10(e) of Executive Order 11491, are relevant since the terminology used in Sections 10(e) is nearly identical to that utilized in Section 7114(a)(2)(A).

In Department of Defense, U.S. Navy, Norfolk Naval Shipyard, 1 FLRA No. 32, May 1, 1979, an unfair labor practice case initiated under Executive Order 11491, the Authority approved the following language used by the Federal Labor Relations Council in its Lyndon B. Johnson Space Center (NASA) decision:11/

> The language of the pertinent portion of section 10(e)... makes clear that it is not the intent of the Order to grant to an exclusive representative a right to be represented in every discussion between agency management and employees. Rather, such a right exists only when the discussions are determined to be formal discussions and concern grievances, personnel policies and practices, or other matters affecting the general working conditions of unit employees. [Footnotes omitted.]

The Authority's decision in 1 FLRC No. 32, also adopted the following Council language from the Council's decision reviewing the Assistant Secretary's decision in A/SLMR No. 908:

> Thus, the discussion or meeting for which representation is sought must be "formal" in nature and the topic of the meeting must be one or more of the matters enumerated in the last sentence of section 10(e), i.e., "grievances,

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11/ National Aeronautics and Space Administration (NASA), Washington, D.C., and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457, 3 FLRC 617 [FLRC No. 74A-95 (September 26, 1975)]. The Authority's decision in 1 FLRA No. 32, resulted from Authority review of the Federal Labor Relations Council's decision remanding a decision of the Assistant Secretary of Labor for Labor-Management Relations in Department of Defense, U.S. Navy, Norfolk, Naval Shipyard, A/SLMR No. 908, [FLRC No. 77A-141 (December 28, 1978)].

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personnel policies and practices, or other matters affecting general working conditions of employees in the unit." Both elements must exist for the right of representation under section 10(e) to accrue either to the exclusive representative or, derivatively, to the employee involved.

As to the first element, the question of whether a meeting is "formal" or informal is essentially a factual determination which, in our view, is a matter best resolved on a case-by-case basis by the Assistant Secretary as finder of fact, taking into consideration and weighing a variety of factors such as: who called the meeting and for what purpose; whether written notice was given; where the meeting was held; who attended; whether a record or notes of the meeting were kept; and what was actually discussed. [Footnotes omitted].

In the instant case it is determined that the July 10, 1980 meeting was "formal" within the meaning of Section 7114(a)(2)(A) for a number of reasons.12/ Van Dover, as supervisor in charge of the Receipts and Verification Unit was a representative of the agency, and the discussion was between a respresentative of the agency and "one or more employees in the (bargaining) unit." The meeting was convened by Van Dover at the request of Section Chief Robert Sykes; both Sykes and Van Dover, two key management officials were involved in planning the meeting in the first instance; the meeting lasted about one hour; all Verification area employees were required to attend; notice of the meeting was given to Verification area employees; Mary Lou Apodaca, was returned from a detail by Van Dover in order to make certain that she would attend; and lastly the subject of the meeting was of considerable concern to management and directly related to the operation of the Center.

Turning to the second element of Section 7114(a)(2)(A), that is whether formal discussion at the July 10, 1980 meeting concerned "any personnel policies or practices or other general conditions of employment," the record clearly indicates that through discussion initiated by Van Dover, there was an unsuccessful attempt to gain voluntary employee acceptance of a significant change in the method of reporting "non-productive" or "unmeasured time" on the back of the Verification Production Report. The discussion also involved an inquiry into the reasons underlying the high productivity of Verification employees, and statements by Van Dover as to the potential future impact of high

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12/ See Department of Health, Education and Welfare, Region IV, Atlanta, Georgia and Department of Health and Human Services, Region IV, Atlanta, Georgia 5 FLRA No. 58 (April 14, 1981).

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productivity levels on Verification employees. She noted that if the employees continued to exceed production standards they would be detailed out more frequently in the future, and that if Verification employees did continue to exceed high production levels, there conceivabily could be some impact on the number of positions in the Unit. The foregoing elements of discussion constituted a "discussion...concerning...personnel policies or practices or other general conditions of employment" within the meaning of Section 7114(a)(2)(A) of the Statute.13/

It should be noted that Section 10(e) of Executive Order 11491 was not construed so narrowly as to encompass only discussions concerning changes or proposed changes in the terms and conditions of employment. Internal Revenue Service, Atlanta District Office, Atlanta, Georgia, A/SLMR No. 1014, 6 FLRC 812 [FLRC No. 78-58 (October 31, 1978)]. It appears that the Authority has taken a similar position in the interpretation of Section 7114(a)(2)(A). Department of Health, Education and Welfare, Region IV, Atlanta, Georgia and Department of Health and Human Services, Region IV, Atlanta, Georgia, supra at Note 12. In this case the record reflects proof of a discussion concerning a change in the terms and conditions of employment in addition to evidence establishing mere discussion of the terms and conditions of employment.

The facts presented here resemble analogous factual situations presented in Internal Revenue Service, Altanta District Office, Atlanta, Georgia, supra; Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, A/SLMR No. 1070, 6 FLRC 920 [FLRC No. 78A-90 (December 6, 1978)]; and Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, 1 FLRA No. 88 (July 31, 1979). It is felt that the rules articulated in these cases govern. Accordingly, it is determined that the facts outlined indicate that the Respondent failed to comply with the provisions of Section 7114(a)(2)(A). This failure involved unfair labor practices within the meaning of Sections 7116(a)(1), (5) and (8) of the Statute.

With regard to the alleged change in requirements "for the reporting of non-productive time," or "unmeasured time," the record clearly indicates that no such change was ever effectuated. No bargaining obligation arises when management makes no change in a past practice or

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13/ The phrase "conditions of employment" is, with exceptions not pertinent here, defined in Section 7103(14) of the Statute as "personnel policies, practices and matters, whether established by rule, regulation or otherwise, affecting working conditions...."

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personnel policy. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, supra; Department of Treasury, Internal Revenue Service, Cleveland, Ohio, 3 FLRA No. 106 (July 17, 1980).

Upon the basis of the foregoing, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. §2423.19(c).

ORDER

Pursuant to Section 2423.29 of the rules and regulations of the Federal Labor Relations Authority, and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the United States Government Printing Office, Public Documents Distribution Center, Pueblo, Colorado, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and unit employees, or their representatives, concerning personnel policies or practices, or other matters affecting general conditions of employment in the unit, without notifying and affording the American Federation of Government Employees, AFL-CIO, Local 3392, the exclusive representative of its employees, or any other exclusive representative of its employees, the opportunity to be represented at such discussions.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by failing to notify and afford the American Federation of Government Employees, AFL-CIO, Local 3392, or any other exclusive representative of its employees, the opportunity to be represented at formal discussions between management and unit employees, or employee representatives, concerning personnel policies or practices, or other matters affecting general conditions of employment in the unit.

(c) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise of any right under the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Federal Service Labor-Management Relations Statute:

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(a) Notify the American Federation of Government Employees, AFL-CIO, Local 3392 of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or employee representatives, concerning personnel policies or practices, or other matters affecting general conditions of employment in the unit.

(b) Post at its facilities at the Public Documents Distribution Center, Pueblo, Colorado, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Manager of the Public Documents Distribution Center and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards, and other places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's rules and regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Louis Scalzo

LOUIS SCALZO
Administrative Law Judge

Dated: May 27, 1981
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions between management and unit employees, or their representatives, concerning personnel policies or practices or other matters affecting general conditions of employment in the unit, without notifying and affording the American Federation of Government Employees, AFL-CIO, Local 3392, the exclusive representative of our employees, or any other exclusive representative of our employees, the opportunity to be represented at such discussions.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by failing to notify and afford the American Federation of Government Employees, AFL-CIO, Local 3392, or any other exclusive representative of our employees, the opportunity to be represented at formal discussions between management and employees, or employee representatives, concerning personnel policies or practices, or other matters affecting general conditions of employment in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 3392, and afford it the opportunity to be represented at, formal

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discussions between management and unit employees or their representatives, concerning personnel policies or practices, or other matters affecting general conditions of employment in the unit.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII of the Federal Labor Relations Authority, whose address is: Suite 680, City Center Square, 1100 Main Street, Kansas City, MO 64105; and whose telephone number is (816) 374-2199.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1705

Union

and

Case No. O-NG-945

GENERAL SERVICES ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

The petition for review in this case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents an issue concerning the negotiability of the following Union proposal:

> The competitive area for bargaining unit employees shall consist of employees of FPRS, OIRM, GMA, and PBS located within the GSA Central Office organization, Metropolitan Washington, D.C. area.

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determination. The instant proposal seeks to define a competitive area within the Agency for purposes of reduction-in-force (RIF). Based on the record it appears that the four organizational elements designated in the proposal, namely FPRS, OIRM, GMA and PBS are subordinate portions of the Agency's metropolitan Washington, D.C. Central Office and are composed of both bargaining unit employees and nonbargaining unit employees.

The Union claims that its proposal is not intended to require either the inclusion of nonbargaining unit employees in the proposed competitive

1/ The Agency's request to file an additional submission in this case pursuant to section 2424.8 of the Authority's Rules and Regulations is denied.

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area or the exclusion of nonbargaining unit employees from the proposed competitive area. Instead, the Union argues that its proposal is intended only to place all bargaining unit employees in a single competitive area.

However, contrary to the Union's position, pursuant to governing regulations set out at 5 CFR 351.402(b) (1984 Supp.),2/ a competitive area is defined in organizational and geographic terms and includes all employees within the competitive area so defined. Notwithstanding the Union's intention only to place all bargaining unit employees in a single competitive area the proposal directly affects the working conditions of nonbargaining unit employees since the establishment of a competitive area must necessarily include nonbargaining unit employees within its boundaries.

The Authority, in American Federation of Govenment Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984), appeal docketed, No. 84-1250 (D.C. Cir. June 15, 1984) has addressed the negotiability of a proposal dealing with competitive areas for RIF purposes where the record established that the proposed competitive area affected non-bargaining unit employees. In that case the Authority noted that it is well established that the duty to bargain does not extend to matters concerning positions and employees outside the bargaining unit. International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 8 FLRA 212 (1982) and cases cited therein at note 5. However, an agency generally may bargain over such matters if it so chooses. See, e.g., American Federation of Government Employees, AFL-CIO, Local 2 and Department of the Army, Military District of Washington, 4 FLRA 450 (1980). Insofar as the proposal defining a competitive area in Office of Personnel Management directly determined conditions of employment of nonunit employees, it was found to concern matters beyond the representation rights of the union and, hence, not within the agency's obligation to bargain. See also Service Employees' International Union, AFL-CIO, Local 556 and Department of the Army, Office of the Adjutant General, Hale Koa Hotel, Honolulu, Hawaii, 9 FLRA 687 (1982).

Therefore, since the record in this case establishes that the proposal directly determines conditions of employment of employees not within the bargaining unit and the Agency has not elected to bargain on such matter, it must be concluded, for the reasons stated in Office of

2/ This OPM regulation is a Government-wide regulation within the meaning of section 7117(a)(1) of the Statute because, pursuant to 5 CFR 351.202 (1984 Supp.), it applies to the Federal civilian work force as a whole. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 751-755 (1980).

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Personnel Management, that the proposal is similarly outside the duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 7-CA-30386

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the stipulation of facts, accompanying exhibits, and the contentions of the parties, the Authority finds:

The complaint alleges that the Respondent, Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[1/] in essence by conducting a formal discussion with

---

1/ Section 7116(a)(1), (5) and (8) provides as follows:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(Continued)

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an employee in the bargaining unit represented exclusively by the Charging Party, American Federation of Government Employees, AFL-CIO, Local 1592 (the Union), without first notifying the Union and affording it the opportunity to be present, thereby failing or refusing to comply with section 7114(a)(2)(A) of the Statute.2/

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nationwide bargaining unit of all nonsupervisory, nonprofessional employees of Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio. The Union is an affiliate and agent of AFGE for the purpose of administration of the contract covering the bargaining unit employees located at the Respondent's installation at Hill Air Force Base, Utah.

On March 2, 1983, Earl D. Berry, a member of the bargaining unit, received his annual performance appraisal under the Air Force Civilian Potential Appraisal System (CPAS). The rating official was supervisor Raymond Hess; the reviewing official was Robert L. Welty. On March 4, Berry and his Union representative, Coop, met with Hess at the first (informal) step of the negotiated grievance procedure, and complained that certain items in the CPAS were improperly graded under Article 15 of the parties' negotiated agreement. The grievance was not resolved at this step and, after the second-step grievance proceedings, Respondent notified Berry and the Union of its decision to resolve the grievance by giving Berry a new evaluation.

(Continued)

> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
>
> . . . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

2/ Section 7114(a)(2)(A) provides as follows:

> § 7114. Representation rights and duties
>
> . . . . . .
>
> (a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

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On April 11, Hess directed Berry to accompany him to Welty's office to give Berry his reevaluation and to talk about it. Berry requested the presence of his Union representative, Nyland. Hess stated that he had already discussed Nyland's presence at the meeting with Welty and a third-level supervisor, and that they had decided that the presentation of the reevaluation was the same as the original presentation of his evaluation, and the Respondent did not want to establish a precedent of having the Union present at the time of giving a performance evaluation to an employee. At the office, Hess gave Berry the new evaluation, and Berry indicated that he could not agree with it because it lowered a rating in a category that had not been the subject of the grievance. Only Hess and Berry were present, and the entire meeting lasted ten minutes. At the conclusion of the meeting, Hess noted Berry's refusal to sign the new evaluation, and gave Berry a copy of the unsigned evaluation.

On May 2, the Union filed a third-step grievance over the reevaluation of Berry on April 11. By letter dated May 23, Respondent's Vice Commander, Musser, responded, directing that a new reappraisal be performed, because he felt that only a reappraisal of the initially grieved items should have been made, and that non-grieved items should not have been changed.

The General Counsel and the Union contend that the April 11 meeting was a "formal discussion" concerning a grievance within the meaning of section 7114(a)(2)(A) of the Statute, and that the Respondent's failure to notify the Union and afford it the opportunity to be present constituted a violation of section 7116(a)(1), (5) and (8). Although the General Counsel argues that the meeting was more than a performance evaluation meeting, but rather was integrally related to the resolution of a grievance, the Authority finds it unnecessary to pass upon such contention because we conclude that the element of "formality" was absent from the meeting.

In Bureau of Government Financial Operations, Headquarters, 15 FLRA No. 87 (1984), the Authority held that in order for a union's rights under section 7114(a)(2)(A) of the Statute to attach, all elements set forth in that section must be found to exist: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more employees in the unit or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. Further, in Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115 (1982), the Authority noted a number of factors relevant to a determination of whether meetings alleged to be formal discussions within the meaning of section 7114(a)(2)(A) of the Statute are in fact "formal" in nature. Thereafter, in Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475 (1984), the Authority emphasized that such factors were not intended to be exhaustive, and that other factors may be identified and applied as appropriate in a particular case. Thus, in determining formality, the Authority will consider the totality of facts and circumstances presented.

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In the particular facts and circumstances of this case, the Authority concludes that the meeting of April 11, wherein supervisor Hess gave employee Berry a new performance appraisal and discussed it with him, was not "formal" in nature as contemplated in section 7114(a)(2)(A) of the Statute. Thus, the meeting was held by Berry's first-level supervisor, with no other management officials present; the meeting lasted only about 10 minutes; the meeting was called informally and was not scheduled in advance; there was no formal agenda; and Berry's comments were not noted or transcribed.

As the April 11 meeting was not "formal" in nature, and therefore not all of the elements in section 7114(a)(2)(A) have been found to exist, the meeting was not a "formal discussion" within the meaning of that section of the Statute. Bureau of Government Financial Operations, Headquarters, supra. Accordingly, the Respondent's failure to provide the Union with an opportunity to be represented did not violate the Statute, and the complaint herein shall be dismissed. See Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 16 FLRA No. 137 (1984).

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-30386 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U. S. DEPARTMENT OF LABOR

Agency

Case No. 0-AR-762

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Paul J. Fasser, Jr. filed by both the Agency and the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter concerns an allegation that the Agency had failed to provide the grievant, who has an extreme sensitivity to tobacco smoke due to a medical condition, with a totally smoke-free working environment. The Agency had moved the grievant's work station several times to different locations in an effort to accommodate her sensitivity, but for various reasons each location proved unsatisfactory to either the grievant or the Agency. The grievant was ultimately assigned to a permanent work station in which she was supplied with a fan and surgical mask, partitions were erected and the room rearranged so that the nearest smoker was thirty feet away. Grievant did not find this arrangement satisfactory, requested and was granted leave without pay and filed the subject grievance which proceeded to arbitration. The original arbitrator, at the Union's request, issued an Interim Directive which, in effect, banned smoking in the grievant's work area. This Interim Directive was not accepted by the grievant, the Union or the Agency and the original arbitrator withdrew from the case. The Arbitrator in the award before the Authority determined that the Agency acted responsibly in dealing with the grievant and met its obligation under the parties' collective bargaining agreement and appropriate regulation to provide as nearly as possible a suitable work environment. However, the Arbitrator awarded the grievant backpay plus accrued benefits for the period between the date of the Interim Directive and the date the Agency rejected it, reasoning that during that period, the leave without pay was not under the grievant's control. The Union and the Agency then filed the instant exceptions to this award.

In its exceptions, the Union contends that the award is contrary to law, rule and regulation and the parties' collective bargaining agree-

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ment. In support of its exceptions, essentially reiterating arguments made before the Arbitrator, the Union asserts: (1) the Arbitrator erred in failing to find that the grievant was a handicapped employee pursuant to section 791 of the Rehabilitation Act, 29 U.S.C. § 701 et seq., and was therefore entitled to an accommodation of her handicap which was not provided by the Agency; (2) the Arbitrator erred in finding that the Agency had fully discharged its obligation to the grievant under the Rehabilitation Act, Executive Order 12196, (pertaining to occupational safety and health programs for Federal employees) and implementing regulations, and a related provision of the parties' collective bargaining agreement; and (3) the Arbitrator erred in failing to find that the Agency's failure to provide the grievant with a smoke-free environment constituted an unjustified and unwarranted personnel action within the meaning of the Back Pay Act, 5 U.S.C. § 5596. The Union also asserts that the Arbitrator's failure to award all backpay and other relief sought by the grievant and to restore leave was arbitrary, capricious and unreasonable.1/

However, the Authority concludes that the Union fails to establish the award is deficient as alleged. Rather, it is clear that the Union is attempting to relitigate the merits of the case before the Authority and that the thrust of the Union's arguments constitutes nothing more than disagreement with the Arbitrator's findings of fact and reasoning and conclusions in resolving the dispute before him and with his interpretation and application of the parties' collective bargaining agreement. Consequently, the exceptions do not provide a basis for finding the award deficient and are denied. See, e.g., Department of the Air Force, Williams Air Force Base, Arizona and American Federation of Government Employees, Local 1776, 12 FLRA 509 (1983); National Treasury Employees Union and U.S. Nuclear Regulatory Commission, 12 FLRA 609 (1983).

In its exceptions, the Agency contends, among other things, that the award violates the Back Pay Act, 5 U.S.C. § 5596. The Authority agrees.

The Authority has uniformly held that for an award of backpay to be authorized under the Back Pay Act, there must be a determination that the employee was affected by an unwarranted personnel action and also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances or differentials the employee would otherwise have earned or received. E.g., Jefferson Barracks National Cemetary, St. Louis, Missouri and National Association of Government Employees, Local R14-116, 13 FLRA 703 (1984). In terms of

1/ The Union also requests attorney fees. In this regard, since the Arbitrator's award of backpay is set aside as contrary to the Back Pay Act, an award of attorney fees is unwarranted. See Audie L. Murphy Veterans Administration Hospital, San Antonio, Texas and American Federation of Government Employees, AFL-CIO, Local No. 3511, 16 FLRA No. 140 (1984).

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this case, the Arbitrator found only that during the pendency of the Interim Directive, the grievant was in a leave without pay status for reasons not under her control[2/] and that it was "fair and proper" to award wages and other accrued benefits for that period. The Arbitrator plainly failed to make the findings necessary for an authorized award of backpay; indeed, the Arbitrator found that the Agency met its obligation to provide the grievant with a suitable work environment. Consequently, the award of backpay plus accrued benefits is contrary to the Back Pay Act and is set aside.[3/]

Issued, Washington, D.C. May 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ At the same time, the Arbitrator found that the Interim Directive, prohibiting smoking in the grievant's work room, failed for lack of acceptance by the grievant and the Union as well as the Agency. The Arbitrator attributed the Union's dissatisfaction to the Union's concern for the rights of employees who smoke, and the grievant's dissatisfaction to insistence on a smoke-free work room as the only acceptable alternative.

3/ In view of this decision it is not necessary to address the Agency's other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 3615

Union

and

Case No. 0-AR-618

SOCIAL SECURITY ADMINISTRATION,
ARLINGTON, VIRGINIA

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Jacob Seidenberg filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

As relevant to the case before the Authority, the Arbitrator awarded as follows:

> We find that, despite our denial of the Grievance, the Union was required to expend official time in a matter that had antecedents in the Agency's technical breach of the Agreement. We, therefore, find that the Agency should not charge the Union any official time devoted to preparing and litigating this Grievance.

In its exceptions the Agency contends, among other things, that to the extent the award prevents them from charging the Union any official time, it is contrary section 7131(d) of the Statute. The Authority agrees.

Section 7131(d) provides:

> Except as provided in the preceding subsections of this section--

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(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Pursuant to section 7131(d) of the Statute, the parties negotiated provisions for official time, including the authorization of a limited amount of official time for the processing of grievances. As explained by the U.S. Supreme Court in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439 (1983), union representatives granted official time under section 7131 when they otherwise would be in a duty status are entitled to receive their normal salary compensation without charge to leave. Thus, by being granted official time in order to process grievances, union representatives are not penalized by a loss of salary because Congress equated the term "official time" to "paid time." BATF at 445 (citing H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978)). Indeed, it is only by virtue of being granted official time that employees acting as union representatives engaged in the processing of grievances when they otherwise would be in a duty status, as herein, receive their normal salary compensation without charge to leave.

By directing that the union representatives not be charged official time, and implicitly that they still receive normal salary compensation without charge to leave as if they were in a duty status, the award is deficient as contrary to section 7131 of the Statute. That is to say, in these circumstances, the union representatives must either be on official time or be in a leave status. Consequently, the award is modified by striking the quoted portion of award.*/

Issued, Washington, D.C., May 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In view of this decision, it is not necessary to address the other exceptions.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE ADJUTANT GENERAL,
STATE OF OHIO

Agency

and

Case No. 0-AR-567

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, OHIO COUNCIL OF
AIR NATIONAL GUARD LOCALS NO. 127,
LOCAL 3470

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Rankin M. Gibson filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter arose when the Agency informed the Union that after the expiration of the parties' collective bargaining agreement, all civilian technicians of the Ohio National Guard would have to wear the military uniform while on duty as required by National Guard regulations. The parties' agreement provided that technicians could annually elect to wear standardized civilian attire rather than military attire while on duty by submitting a written declaration of their choice. Prior to the expiration date of the agreement, a number of technicians submitted declarations exercising their option to wear civilian attire for the next year. A number of other technicians filed declarations after the expiration date of the agreement. Upon expiration of the agreement, the Agency refused to recognize any of the declarations and required all technicians to wear the military uniform while on duty. A grievance was filed objecting both to the termination of the annual declaration policy and to the requirement that technicians wear the military uniform and requesting that during the pendency of the grievance the technicians' declarations be honored. In resolving the grievance, the Arbitrator determined that technicians who submitted a uniform declaration prior to the expiration of the agreement had a right to have their selection remain in force for one year, but that technicians who did not submit a declaration until after expiration of the agreement did not have such a right. Accordingly, the Arbitrator sustained the grievance in part and denied it in part.

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In its exception, the Union contends that the Arbitrator's denial of the grievance insofar as it concerned technicians who filed declarations after expiration of the agreement is contrary to law. More specifically, the Union essentially argues that since the uniform-wearing requirement is a mandatory subject of bargaining, the applicable provision in the parties' agreement continued in effect after the agreement had expired, and therefore the Arbitrator erred as a matter of law in concluding that technicians who submitted declarations subsequent to the expiration of the agreement did not have a right to wear civilian attire.

The Authority concludes that the Union has failed to establish the Arbitrator's award is deficient as alleged. It is well-established that following the expiration of a collective bargaining agreement, either party to that agreement may elect not to be bound by a practice embodied in any contract provision which relates to a matter that is outside the scope of bargaining under the Statute, i.e., a permissive subject of bargaining. E.g., Headquarters, Fort Sam Houston, Department of the Army and Local 2154, American Federation of Government Employees, AFL-CIO, 15 FLRA No. 181 (1984). In this regard, the Authority has held that the requirement that civilian technicians wear military uniforms is a permissive rather than a mandatory subject of bargaining. Division of Military and Naval Affairs, State of New York, Albany, New York and New York Council, Association of Civilian Technicians, 15 FLRA No. 65 (1984), petition for review denied sub nom., New York Council, Association of Civilian Technicians v. FLRA, No. 84-4128 (2d Cir., March 14, 1985). In the terms of this case, since the requirement that civilian technicians wear military uniforms constitutes a permissive subject of bargaining, the pertinent provision of the agreement, while binding the parties during the term of the agreement, could be terminated by either party when the agreement expired. Thus, after the expiration of the parties' agreement the Agency was entitled, as it did, to elect not to be bound by the provision in the agreement and to implement the uniform requirement. The Adjutant General, State of Ohio and American Federation of Government Employees, AFL CIO, Ohio Council of the Air National Guard Locals No. 127, Local 3041, 17 FLRA No. 54 (1985). Therefore, contrary to the Union's assertion, the Arbitrator's award denying the grievance is in accordance with law.

Accordingly, the Union's exception is denied.

Issued, Washington, D.C., May 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

REGION III, SOCIAL SECURITY
ADMINISTRATION, DEPARTMENT OF
HEALTH AND HUMAN SERVICES

Activity

and

Case No. 0-AR-571

REGION III, AFGE NATIONAL COUNCIL
OF SSA FIELD OPERATIONS LOCALS

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Gladys Gershenfeld filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute in this matter arose when the Activity changed the lunch and rest breaks of employees in a number of offices to ensure that all employees in all of its offices were provided with a 30-minute unpaid lunch break and two 15-minute paid rest breaks separate from the lunch break. More specifically, the Activity terminated a long-standing practice in 20 of its offices of granting employees 10 to 15 minutes paid time in connection with their 30-minute unpaid lunch periods, changed another practice in 3 offices of granting employees an additional 15 minutes of paid time on payday for personal banking purposes, and changed the rest-break practices in 14 offices, increasing the rest-break time in 13 of those offices to ensure that the employees were given the two 15-minute paid rest breaks each day. The Arbitrator found that the daily extensions of the lunch break, with additional time on payday in some offices, constituted established past practices. The Arbitrator determined that the past practice provision in the parties' collective bargaining agreement was controlling in this situation in the absence of any contrary laws or government-wide rules or regulations. Finding no legal, regulatory or contractural prohibitions against the practice of granting the paid-time extensions of the lunch break and further finding that management had the authority to grant paid time off under its authority to grant administrative leave, the Arbitrator concluded that the Activity violated the parties' agreement when it unilaterally changed the established practices. As a remedy, the Arbitrator directed the Activity, among other things, to reinstate and continue the practices.

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In its exceptions to that portion of the Arbitrator's award, the Activity principally alleges that the award is contrary to 5 U.S.C. § 6101(a).1/ The Authority agrees.

Under 5 U.S.C. § 6101, agencies are required to schedule 40 hours of work per week for each full-time employee and, when possible, to schedule

1/ 5 U.S.C. § 6101(a) provides, in pertinent part:

§ 6101. Basic 40-hour workweek; work schedules; regulations

(a)(1) . . . . . .

(2) The head of each Executive agency, military department, and of the government of the District of Columbia shall--

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) . . . . . .

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and that 2 days outside the basic workweek are consecutive;

(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

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the work in five days with 8 work hours each day.2/ The Comptroller General has decided that unpaid breaks in the working hours, such as lunch breaks,3/ may be scheduled pursuant to section 6101(a)(3)(F), but such noncompensable break time may not exceed one hour without concurrence of the employee. B-190011, December 30, 1977. The Comptroller General has also ruled that employee lunch breaks under section 6101(a)(3)(F) may not be expanded through the use of other authority. Id. More specifically, in B-190011 the Comptroller General decided that while an agency has the discretionary authority to grant employees brief rest periods of paid time as part of a basic 8-hour workday, the agency may not grant employees such short periods of compensable time contiguous to lunch breaks.4/ An agency also has the discretionary authority to grant an employee an excused absence from duty for brief periods without charge to leave or loss of pay (commonly referred to as administrative leave) consistent with Office of Personnel Management guidance, FPM Supplement 990-2, Book 630, Subchapter S11, and decisions of the Comptroller General, e.g., 63 Comp. Gen. 542 (1984).

In this case, the Arbitrator recognized that the Comptroller General had held that lunch breaks could not be extended by other authority such as by granting paid rest breaks contiguous to the lunch period. Indeed, the Arbitrator acknowledged that with respect to a number of offices which had only one 15-minute rest break and an extended lunch period prior to the Activity's changes, the origin of the practice seemed to be that the Activity had extended the lunch period with a paid break. Nevertheless, in rendering the award that she did, the Arbitrator concluded that regardless of the origin of the practice the lunch-period extensions involved in this case were not rest breaks but permissible grants of administrative leave. However, the Authority finds that such an award is not authorized by law. The Arbitrator did not find and it is not otherwise apparent that the Activity had expressly exercised its discretionary authority to grant administrative leave in the circumstances involved. Moreover, in view of the duration and scope

2/ The Comptroller General has held that the basic 40-hour workweek may include holidays and hours in which an employee is in a leave with pay status. 42 Comp. Gen. 195 (1969).

3/ It is well-established that time set aside for a lunch break is not compensable unless the employee is required to perform substantial official duties during that period. E.g., Baker v. United States, 218 Ct. Cl. 602 (1978); 42 Comp. Gen. 195 (1969).

4/ In the same decision, the Comptroller General encouraged agencies to schedule realistic employee lunch periods of 45 minutes or an hour under 5 U.S.C. § 6101(a)(3)(F) where that amount of time is required for the employees to have lunch, with the caution, however, that any extension in the 30-minute unpaid lunch period would necessitate an appropriate increase in the basic workday to maintain the requisite 40-hour workweek.

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of the practice involved, the excused absences awarded by the Arbitrator are not consistent with the provisions of FPM Supplement 990-2 and the decisions of the Comptroller General. Furthermore, management has a responsibility to correct unlawful past practices and the corrective action may not be delayed by its obligation to bargain over the impact and implementation of a decision to change such a practice. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana and American Federation of Government Employees, Local 3457, AFL-CIO, 9 FLRA 543, 546 n.9 (1982); see also Local 1688, International Brotherhood of Electrical Workers and U.S. Army Engineer District, Omaha, 5 FLRA 44 (1981).

Therefore, to the extent that the Arbitrator's award directs the Activity to reinstate and continue the practice of permitting expanded lunch breaks with periods of paid time the award is contrary to 5 U.S.C. § 6101(a). American Federation of Government Employees, AFL-CIO, Local 3231 and Department of Health and Human Services, Social Security Administration, 17 FLRA No. 83 (1985). Accordingly, the Arbitrator's award is modified by striking that part of the award which directs the Activity to reinstitute and continue the practice found contrary to law.

Issued, Washington, D.C., May 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE VETERANS ADMINISTRATION
MEDICAL CENTER, TOGUS, MAINE

Activity

and

Case No. O-AR-646

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2610, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Jerome S. Rubenstein filed by the Veterans Administration (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The dispute before the Arbitrator involved four separate grievances which were consolidated for consideration and resolution by the Arbitrator. The Agency filed exceptions to the Arbitrator's award with respect to two of the grievances. In the first of those grievances, the Union alleged that a temporary employee, who was employed for 104 hours as a WG-8 plumber, should have been paid at the WG-10 rate, the pay rate of permanent employees doing the same work. The Arbitrator agreed, essentially finding that the Activity acted improperly by setting different rates of pay for the same work and hiring a temporary employee at a lower rate than permanent employees. As his award, the Arbitrator ordered the Activity to pay the grievant the difference between the WG-8 and WG-10 pay rates.

In its exceptions to the Arbitrator's award as to this grievance, the Agency contends, among other things, that the award is contrary to section 7121(c)(5) of the Statute. In support of this exception, the Agency essentially argues that the grievance directly concerned the classification of the grievant's position.

The Authority finds that the award is contrary to section 7121(c)(5) of the Statute as alleged. It is clear that the substance of the grievance before the Arbitrator was whether the duties performed by the

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grievant should have been compensated at the pay rate for the higher-grade level. Therefore, because of this direct "interconnection" between the grievance and the classification of the grievant's position and because of the reclassification effect of the award, the grievance and the award concern the classification of a position within the meaning of section 7121(c)(5) which precludes such matters from grievance and arbitration. E.g., Overseas Education Association and Department of Defense Dependents Schools, 15 FLRA No. 77 (1984). Accordingly, by finding the grievance arbitrable and resolving it on the merits, the award as to this grievance is deficient and is set aside.1/

The second grievance arose when the Activity discontinued detailing the WG-8 grievant to a WG-10 position when filling that position on a temporary basis. The Union alleged that the Activity thereby violated the parties' collective bargaining agreement which requires with regard to details equitable rotation among employees who have been determined by management to have the capacity and requisite skills for assuming the responsibilities of the assignment. The Activity maintained that management had determined, based upon the grievant's performance when detailed to the position on a number of occasions, that he did not possess the capacity and requisite skills to fully perform the higher-graded duties. The Arbitrator essentially concluded that because the Activity had detailed the grievant to the WG-10 position on numerous occasions in the past, he possessed sufficient capacity and skill to warrant continued detail to the position. The Arbitrator therefore found that the Activity violated the parties' agreement when it refused to continue to detail the grievant to the higher-grade position and, as his award, directed the Activity to make the grievant whole for any loss of earnings he sustained as a consequence of the Activity's refusal to detail him to that position.

In its exceptions to the Arbitrator's award as to this grievance, the Agency contends, among other things, that the award is contrary to section 7106(a) of the Statute. The Authority agrees.

It is well-established that an arbitrator's award may not interpret or enforce a provision of a collective bargaining agreement so as to improperly deny the authority of an agency to exercise its statutory rights under 7106(a) of the Statute, or so as to result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights. E.g., Veterans Administration Hospital, Lebanon, Pennsylvania and American Federation of Government Employees, AFL-CIO, Local 1966, 11 FLRA 193 (1983). Section 7106(a)(2)(A) of the Statute reserves to management the right to assign employees and that right includes the discretion to determine the particular qualifications and skills needed to perform the duties of a position and to determine whether an employee possesses those qualifications and skills. E.g.,

1/ In view of this decision, it is not necessary to address the Agency's other exceptions to the award concerning this grievance.

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Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration National Cemetery Office, San Francisco, California, 9 FLRA 703, 706 (1982).

In this case, management determined that the grievant lacked the requisite capacity and skills to perform the full range of duties required of the WG-10 position. Contrary to that determination the Arbitrator in effect concluded that because the Activity had previously detailed the grievant to the position, the grievant possessed sufficient capacity and skill to perform the higher-graded duties. Thus, the Arbitrator's award directing the Activity to continue detailing the grievant to the WG-10 position based upon such a contrary conclusion clearly results in the substitution of the Arbitrator's judgment for that of management in exercising its right to determine whether an employee possesses the qualifications and skills needed to perform the duties of a position. Consequently, the award as to this grievance is contrary to section 7106(a)(2)(A) of the Statute and is set aside.2/

Issued, Washington, D.C., May 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this decision, it is not necessary to address the Agency's other exceptions to the award concerning this grievance.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION, LEWIS
RESEARCH CENTER

Activity

and

Case No. 0-AR-636

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 28, LESA (AFL-CIO)

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Roland Strasshofer, Jr. filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

A grievance was filed and submitted to arbitration claiming that management violated law and the parties' collective bargaining agreement by changing the duties and responsibilities of the grievant. The Arbitrator determined that the Activity's removal of functions, duties, and responsibilities from the grievant was a reprisal for the request of the grievant that the classification of her position be reviewed. The Arbitrator ruled that these actions constituted a prohibited personnel practice under 5 U.S.C. § 2302(b)(9) which prohibits the taking of a personnel action against an employee as a reprisal for the exercise of any appeal right granted by law, rule, or regulation. Accordingly, as his award to remedy the prohibited personnel practice, the Arbitrator ordered that the duties and responsibilities which were removed from the grievant during the period between September 8, 1980, and October 15, 1981, shall be returned to her; that a new desk audit will then be conducted; and that the grievant's appeal rights with respect to the new audit are preserved as guaranteed by the parties' collective bargaining agreement.

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In its first exception the Activity contends that the award is contrary to section 7106(a) of the Statute. Specifically, the Activity essentially argues that the ordered return of particular duties and responsibilities to the grievant conflicts with management's right under section 7106(a)(2)(B) to assign work and to determine the personnel by which agency operations shall be conducted.

The Authority concludes that the Activity has failed to establish in what manner the award is contrary to section 7106(a)(2)(B) of the Statute. As has been noted, the Arbitrator found that the duties were removed from the grievant as a reprisal for her request of a review of the classification of her position, which reprisal constituted a prohibited personnel practice under section 2302(b)(9). As a remedy, the Arbitrator has merely required for the purposes of a new classification desk audit the reassignment of that work to the grievant. In this regard the Authority has previously indicated that management rights must be exercised in accordance with applicable laws, and the Authority therefore specifically held that a proposal which would prohibit discrimination which constituted a prohibited personnel practice under section 2302(b)(10) was not inconsistent with the proper exercise of those rights. American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missile Command, Redstone Arsenal, Alabama, 10 FLRA 440 (1982) (proposal 1). Moreover, the Authority further held that prohibited personnel practices affect conditions of employment and that a prohibition against such practices may be enforced through the negotiated grievance procedure unless such matters are excluded by the parties. Id. In terms of whether the award constitutes a proper enforcement, the Authority indicated in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 14 FLRA 243 (1984) (provision 3) that a preclusion against the reassignment of work from employees and positions involved in a classification appeal until the completion of the appeal if the reassignment was intended to negate the classification appeal did not interfere with management's right to assign work under section 7106(a)(2)(B). Thus, the Authority finds that the Activity's exception provides no basis for finding the award deficient.

In its second exception the Activity essentially contends that the award is contrary to section 7106(b)(1) of the Statute by interfering with management's right under that provision to determine the grade of employees and positions assigned to an organizational subdivision, work project, or tour of duty. Assuming that the parties' collective bargaining agreement contains no applicable negotiated provision constituting the Activity's election under section 7106(b)(1) to negotiate, the Authority concludes that the Activity has failed to establish in its exception that the award concerns a matter which is negotiable only at the election of the Activity under section 7106(b)(1). The Agency has in no manner established that the award is directly or integrally related to the grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty so as to be determinative of such grades. See, e.g., National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927, 928-30 (1979). Consequently, the second exception provides no basis for finding the award deficient.

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In its third exception the Activity contends that the award is contrary to section 7121(c)(5) of the Statute which excludes from grievance and arbitration most grievances concerning the classification of any position. In support the Activity argues that to the extent the Arbitrator by indirection has ordered a promotion the exclusionary provisions of section 7121(c)(5) apply. The Authority however concludes that the Activity has failed to establish that the award is contrary to section 7121(c)(5). Contrary to the assertion of the Activity, the Authority finds that the award in no manner, by indirection or otherwise, orders the promotion of the grievant. Moreover, in resolving the grievance the Arbitrator did not order any change in the classification, grade, or pay system of the grievant's position. See U.S. Department of Labor and American Federation of Government Employees, Local No. 644, NCFLL, 12 FLRA 639 (1983). Consequently, no basis is provided for finding the award deficient as contrary to section 7121(c)(5).

Accordingly, the Activity's exceptions are denied.

Issued, Washington, D.C., May 9, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, SPACE DIVISION,
LOS ANGELES AIR FORCE STATION,
CALIFORNIA

Activity

and

Case No. 0-AR-724

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2429

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Michael D. Rappaport filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The grievance in this case involves the application of certain appraisal procedures to bargaining-unit employees. A grievance was filed and submitted to arbitration. The Arbitrator stated the initial issue to be whether parts of the grievance were precluded by an earlier-filed unfair labor practice charge. As to the disputed portions of the grievance, the Arbitrator determined that those portions were precluded by the unfair labor practice charge. In this respect the Arbitrator ruled that the issues of the charge and the grievance were essentially the same. He further ruled that these issues had been raised under the unfair labor practice procedures within the meaning of section 7116(d) of the Statute*/ despite the unfair labor practice charge having been withdrawn. As the Arbitrator stated:

*/ Section 7116(d) of the Statute pertinently provides:

> [I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

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> [I]n a clear attempt to reduce forum shopping, the emphasis seems to be in the initial choice of forum . . . [and] the fact that the matter was subsequently withdrawn, after the forum had been selected, would have little or no bearing on the matter. The language of the Statute itself talks in terms of "raising" the issue under either procedure. It does not talk in terms of pursuing the matter to its conclusion or even in terms of hearing the matter under either procedure. . . . The issue is raised when the forum is selected . . . [and] the Union selected as the forum to raise the issues in question the unfair labor practice procedure.

As to the portions of the grievance that were not precluded, the Arbitrator stated the issue to be whether the parties' collective bargaining agreement had been violated by the Activity's implementation of the appraisal procedures and he determined that the Activity had not violated the agreement. Accordingly, the Arbitrator denied the grievance.

In its first exception the Union contends that the Arbitrator erred by finding portions of the grievance precluded by section 7116(d) of the Statute. The Union essentially argues that the disputed portions of the grievance were not barred by the unfair labor practice charge because the charge was withdrawn and never adjudicated and because the issues were different.

The Authority concludes that the Union's exception provides no basis for finding that the Arbitrator's award is contrary to section 7116(d) of the Statute. As noted, the Arbitrator ruled that the issues were essentially the same and the Union in its exception fails to establish otherwise. See Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California, 13 FLRA 631 (1984). The Arbitrator also ruled that the filing of the unfair labor practice charge constituted the raising of the issues under the unfair labor practice procedures, which constituted the election of those procedures and precluded the raising of those issues subsequently as a grievance. The Arbitrator found that the critical event with respect to this aspect of section 7116(d) occurs when the procedures are selected by the filing of a charge or a grievance. In this regard, contrary to the argument of the Union, the Authority finds that the Arbitrator properly interpreted and applied section 7116(d) to the Union's invocation of the unfair labor practice procedures. Cf. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 12 FLRA 198 (1983) (In a finding adopted by the Authority, the judge found a portion of the complaint precluded by an earlier-filed grievance despite the grievance having been withdrawn without resolution.). More specifically, the Arbitrator's determination that the disputed portions of the grievance had been "raised" within the meaning of section 7116(d) at the time of the filing of the unfair labor practice charge, despite the charge subsequently having been withdrawn

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and never adjudicated, is consistent with the ordinary meaning of the term "raised," which is "to bring about; set in motion." Webster's Third New International Dictionary (1976 ed.). Furthermore, this determination is fully consonant with the language and purpose of the Statute in placing the election of procedures squarely "in the discretion of the aggrieved party." By making the filing of the charge the determinative factor rather than subsequent action respecting the charge, the Arbitrator's award effectuates this purpose of the Statute by having assured the exercise by the Union of the election of the unfair labor practice procedures. Likewise, the Arbitrator's recognition of the filing date as the operative factor in the election of procedures accords with section 7121(d) and (e) of the Statute which similarly grant an aggrieved employee an option of raising a matter under various procedures and which explicitly recognize filing as the determinative factor in when the election of procedures is exercised. Consequently, the Union has failed to establish that the award is deficient under the Statute. See Overseas Education Association and Department of Defense Dependents Schools, 16 FLRA No. 95 (1984).

In its other exceptions the Union essentially contends that the Arbitrator's denial of the other portions of the grievance is deficient in numerous respects. However, as noted, the Arbitrator's award denying such portions of the grievance was expressly based on his determination that the Activity had not violated the collective bargaining agreement. Thus, the Union's exceptions constitute nothing more than disagreement with the Arbitrator's interpretation and application of the parties' agreement and provide no basis for finding the award deficient. See, e.g., American Federation of Government Employees, Local 1858, AFL-CIO and U.S. Army Missile Command, Missile and Munitions Center and School, Redstone Arsenal, Alabama, 13 FLRA 343 (1983).

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 10, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NUCLEAR REGULATORY COMMISSION

Respondent

and

Case No. 3-CA-20672

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices as alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Exceptions to the Judge's Decision in this regard were filed by the Respondent and an opposition thereto was filed by the Charging Party.1/ The Judge found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of those portions of the complaint. No exceptions were filed to the Judge's Decision in this regard.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally changing an established past practice that allowed unit employees who filed grievances under the agency's grievance procedure challenging their nonselection for supervisory positions to be represented by union stewards, without first affording the Charging Party proper notice and an opportunity to bargain with regard to such change.

1/ The Charging Party's motion to waive the time limit for filing its Brief in Opposition to the Respondent's exceptions was denied by the Authority, by letter dated August 24, 1983. Thus, its opposition brief, untimely filed, has not been considered.

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The Judge found that, while the Respondent was not obligated to bargain with the Union as to the role the Union would have in agency procedures to challenge supervisory selections or as to who would be allowed to represent employees in those proceedings, the Respondent was not precluded from bargaining on such matters. He further found that the Respondent had bargained about and established a practice of allowing Union stewards to represent employees as personal representatives in supervisory selection grievances, and that it violated section 7116(a)(1) and (5) of the Statute by terminating such practice without first affording the Union adequate notice and an opportunity to bargain concerning the change. The Authority disagrees.

The Respondent contends, inter alia, that the Judge erred in finding that the Respondent had agreed to or allowed a practice to develop of allowing Union stewards to represent employees as personal representatives in supervisory selection grievances and, in any event, in concluding that the Respondent's actions involved a change in a condition of employment of bargaining unit employees.

In reaching his conclusion in this case, the Judge reviewed the role the Union had taken in several grievances over a period of approximately three years. He also reviewed the exchange of correspondence between the parties during that time on the subject of the Union's role in the grievances, and found that "such conduct on Respondent's part was tantamout to having bargained with the Union concerning steward's representation." We disagree. While we agree with the Judge that an agency is not precluded from bargaining as to the role a labor organization may take in agency promotion procedures to challenge supervisory selections,[2/] we find that the record evidence does not support the Judge's finding that the Respondent's conduct amounted to bargaining with regard to the Union's role herein. At most, a practice developed whereby the Respondent accepted as representatives of grievants, on an ad hoc basis, persons who were sometimes identified as stewards, and sometimes only as personal representatives. It is not clear that, when identified as personal representatives, they were also being recognized in their capacity as stewards. In fact, in our view, the very exchange of correspondence relied upon by the Judge leads rather to the conclusion that no agreement as to the exact role the Union may take was reached, but instead continued to be a matter in dispute.

It is well settled that procedures for filling supervisory positions are matters outside the duty to bargain, as such procedures concern

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2/ Cf. American Federation of Government Employees, AFL-CIO, 15 FLRA No. 63 (1984), in which the Authority noted that while "promotion procedures for supervisory positions are outside the obligation to bargain, an agency may bargain on and agree to promotion procedures for supervisory positions as part of its collective bargaining agreement."

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non-bargaining unit positions and do not concern conditions of employment of bargaining unit employees within the meaning of section 7103(a)(14), and that a change in such procedures therefore does not constitute a violation of section 7116(a)(1) or (5) of the Statute.3/ In the Authority's view, procedures for challenging the selection of supervisors are integrally related to the procedures for filling supervisory positions. Therefore, since the Respondent had no duty to bargain concerning the supervisory selection process itself, the Authority concludes that the Respondent also had no obligation under the Statute to bargain concerning the role of the Union, if any, in agency procedures to challenge supervisory selections, inasmuch as such matters similarly do not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute. In this regard, the Authority notes that section 7102(2) of the Statute4/ provides that employees have the right to engage in collective bargaining, through their exclusive representative(s), with respect to conditions of employment. It follows that employees' exclusive representative(s) also have the statutory right to represent employees only with respect to their conditions of employment. Having determined that the matters here involved do not concern conditions of employment of bargaining unit employees, the Authority concludes that the Respondent did not violate section 7116(a)(1) or (5) of the Statute by unilaterally changing a past practice concerning the

3/ See Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 11 FLRA No. 66 (1983), and cases cited therein. With respect to management's right to make changes concerning matters which do not affect bargaining unit employees' conditions of employment, see Department of the Navy, Naval Construction Battalion Center, Port Hueneme, California, 14 FLRA No. 60 (1984); Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington, 14 FLRA No. 89 (1984).

4/ Section 7102 provides in pertinent part:

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labot organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

. . . . . .

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

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representation of unit employees in these matters. Accordingly, and noting particularly that no exceptions were filed with respect to the Judge's recommended dismissal of certain other allegations of the complaint, the Authority shall order that the complaint be dismissed in its entirety.5/

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-20672 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., May 10, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ In view of the foregoing conclusion, we find it unnecessary to pass upon the Respondent's contentions with respect to the sufficiency of the complaint, or with respect to the remedy recommended by the Judge.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NUCLEAR REGULATORY COMMISSION Respondent	
and	Case No. 3-CA-20672
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Dennis C. Dambly, Esq. and
James E. Cradock, Esq.
For the Respondent

Mary W. Haller, Esq. and
James R. Lawrence, Esq. on the brief
For the Charging Party

Carol J. Dixon, Esq. and
Bruce D. Rosenstein, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq.

Upon an unfair labor practice charge filed by the National Treasury Employees Union (herein referred to as NTEU or the Union) on July 16, 1982 against the Nuclear Regulatory Commission (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region III, issued a Complaint and Notice of Hearing on

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September 30, 1982 alleging Respondent unilaterally changed an established practice of allowing Union stewards to represent unit employees filing grievances concerning supervisory selections under the agency grievance procedure.

A hearing on the Complaint was conducted on November 30, 1982 in Washington, D.C., at which time all parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by all parties and were duly considered.

Upon the entire record in this matter[1/] and from my evaluation of the evidence, I make the following:

Findings of Fact and Conclusions of Law

Issues

Essentially, the General Counsel contends that on June 14, 1982 Respondent unilaterally terminated a practice of allowing Union stewards, both in their capacities as Union officials and personal representatives, to represent bargaining unit employees who were grieving their non-selection to supervisory positions through the agency grievance procedures.

Respondent denies that a practice of permitting Union stewards in their capacity as Union officials to represent employees ever existed and contends that if such a practice did exist, the application of section 7118(a)(4)(A) of the Statute precludes a finding of violation regarding its termination.[2/] Respondent admits the existence of a practice of permitting Union stewards to act as personal representatives of employees who were grieving their non-selection to supervisory positions under the agency grievance procedure, but contends the unilateral discontinuance of the practice did not violate the Statute since Respondent's action involves a matter which is not a working condition within the meaning of the Statute.

1/ Respondent's unopposed Motion to Correct Transcript is granted. However, Respondent's request to have received into evidence a letter from the Regional Director approving the Union's withdrawal of allegations of section 7116(a)(2) and (8) violations is denied since the document is irrelevant to a disposition of the matter herein.

2/ Section 7118(a)(4)(A) provides, in relevent part, that ". . . no complaint shall be issued based upon any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority."

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Background and the Alleged Practice

At all times since November 1978 the Union has been the exclusive collective bargaining representative of various of Respondent's employees. Union representation is provided employees through NTEU Chapter 208.

The record reveals that prior to the filing of this unfair labor practice charge, nine employees had grievances concerning their non-selection to supervisory positions processed by Respondent under the agency grievance machinery, the only procedure available to contest such matters. The agency grievance procedure, set forth in NRC Manual Chapter 4157 and in effect at all times prior to November 30, 1982, provides in section B.1.d. that employees shall have the right to ". . . be accompanied, represented, and advised by representatives of their own choosing in presenting grievances." Section B.3. pertains to the rights of unions in these proceedings and provides:

> "Employee Unions. An employee union which has been granted exclusive recognition for the bargaining unit in which an employee is located shall have the opportunity to be represented at formal discussions between the employee and NRC officials which relate to the adjustment of the grievance. Nothing in this provision shall preclude employees from handling their own grievances, if they wish, or choosing their own representatives. Employee unions may not initiate grievances under the provisions of this chapter but may present a grievance on behalf of an employee or group of employees in the recognized bargaining unit in accordance with the appropriate provisions of the collective bargaining agreement currently in effect."

After the Union became the exclusive representative, employee Harry Mitchell filed the first grievance concerning an employees' non-selection for a supervisory position on September 19, 1979. Thereafter, the Union filed another grievance on behalf of Mitchell relative to the dispute. The matter was subsequently heard at step 3 by a Grievance Examiner.3/ During the grievance proceedings Mitchell was represented by a Union steward at the early stages. When that steward left the agency another steward, Martin Levy, was appointed by the Chapter 208 President to

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3/ Some of the facts relating to Mitchell's grievance are taken from the Report and Recommendations of the Grievance Review Examiner who heard the matter. Although Counsel for Respondent objected to the receipt of this Examiner's Report and Recommendations as an exhibit, Respondent did not present any evidence which challenged matters contained in the document relative to the processing of the grievance.

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represent Mitchell and Levy thereafter "handled" the grievance on behalf of Mitchell. When the grievance came to be heard by a Grievance Examiner, Martha Finlaton, NTEU Assistant Counsel and Martin Levy appeared as co-counsel, the appearance portion of the Grievance Examiner Report and Recommendation stating:

> "Martha Finlaton, Esq.
> Martin Levy, Esq.
> National Treasury Employees Union for the Grievant"

Subsequently, Respondent's official who reviewed the grievance adopted the findings and conclusions of the Examiner. The letter of the reviewing official notifying the parties of this action was sent to Finlaton, identified as Assistant Counsel, NTEU and Levy, who was identified as "Steward."

The second, unit employee who utilized the agency grievance procedure concerning a supervisory selection was James Snell. Snell filed five grievances concerning five separate supervisory vacancy announcements in late November 1980. The grievances were first filed under a negotiated Interim Agreement between the Union and Respondent which existed at the time. In its initial response management indicated that the proper manner of proceeding with such grievances was under the agency procedure and James Thomas, Chapter President and also a steward, subsequently refiled the grievance under that procedure. By memorandum dated January 13, 1981 from Snell to management, Snell appointed five individuals including Thomas as "personal representatives." The memorandum listed the five individuals by name and gave no indication that they were Union officials although the record reveals that at least four of the five persons were Union stewards.4/ When the grievances went to the final step under the agency procedure, presentation before a Grievance Examiner, Thomas appeared as Snell's "personal representative" for two of the grievances and two other stewards represented Snell for the remaining three grievances.

The next employee involved in a supervisory selection grievance was Frank Costello. On January 8, 1981, steward Martin Levy sent a memorandum on Union stationery to management which began: "In accordance with NRC Manual Chapter 4157, specifically paragraphs 041 and A.4.c. among others, on behalf of Mr. Frank Costello, I wish to file a Grievance. Mr. Costello has requested that I act as his Representative." The letter was signed "Martin Levy, Steward NTEU Chapter 208." Levy sent another letter to management on Union stationery concerning the processing of this grievance on March 13, 1981. In that letter Levy stated, inter alia:

4/ The record does not disclose whether or not the fifth individual, George Barber, was a steward but I infer from the totality of the record that Barber was also a steward.

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"Also, it is my understanding that for some obscure reason, the Labor Relations Branch Personnel are advising Management Officials that the Union can not represent Bargaining Unit Employees for certain grievances. Since the law clearly gives the Union the authority to represent Bargaining Unit Employees in all grievances, we find this action disturbing. However, if you accept this permise, then I am filing this request for a hearing, under protest, as the personal representative of the Bargaining Unit Employee. If you recognize the right of the Union to represent Bargaining Unit Employees in all matters which they can grieve, then I am representing the Bargaining Unit Employee as the Chief Steward of NTEU Chapter 208."

When management next responded to matters concerning the Costello grievance on April 1, 1981, its memorandum was addressed to "Martin Levy, Personal Representative for Mr. Costello" and referred to Levy in that manner again in the text of the letter.

The fourth supervisory selection grievance involved employee Paul Guinn. In a memorandum dated February 19, 1981 to management "key line official" Vandy Miller, signed by Jim Thomas, President, NTEU Chapter 208,5/ on Union stationery, Thomas indicated that he was filing a grievance under Manual Chapter 4157 concerning Guinn.6/ After naming Guinn as the grieving employee and setting forth details relating to the grievance, Thomas concluded: "The grievant has requested that NTEU represent him in this matter. Acting in that capacity, I hereby request that you waive further meetings . . ." On March 1, 1981, Paul Bird, Respondent's Director, Division of Organization and Personnel, sent a memorandum to Thomas with the subject heading: "Role of NTEU in Agency Grievance Procedure." The memorandum stated, as follows:

"This is in reference to your memorandum dated February 19, 1981, to Vandy Miller in which you

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5/ As noted above, Thomas, although Chapter 208 President, was also recognized as a Union steward.

6/ A grievance on Guinn's behalf concerning this matter had previously been filed on December 16, 1980 by Union steward Martin Levy. However, in a memorandum of December 23 Miller rejected that grievance informing Levy, inter alia, that while the grievance was filed under Manual Chapter 4157, the grievance used "Interim Agreement" language and the grievance was "outside the scope of the Interim Agreement." Miller also advised Levy that he could only represent Guinn ". . . as an NRC employee, not as a union steward."

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filed a formal grievance on behalf of Paul Guinn under the Agency Grievance Procedure, NRC Appendix 4157. A copy of this memorandum was subsequently referred to me to clarify the Union's rule in an Agency grievance. NRC Chapter 4157-032 delegates this responsibility to the Director, Division of Organization and Personnel. Mr. Miller believes and I agree that such a clarification is necessary before he issues an official response to the grievance.

"The matter in question is the first sentence in your last paragraph - 'The grievant has requested that NTEU represent him in this matter.' NRC Appendix 4157, Part B.3. states that 'Employee unions may not initiate grievances under the provisions of this chapter but may present a grievance on behalf of an employee or group of employees in the recognized bargaining unit in accordance with the appropriate provisions of the collective bargaining currently in agreement effect.' Since the grievance concerns a non-bargaining unit position, the interim agreement is not applicable. The proper channel, therefore, is the agency grievance procedure. However, since NTEU as an entity is prohibited from initiating a grievance under 4157, the above grievance is improperly filed.

"If Mr. Guinn wants you to represent him in this matter, you may do so only as his personal representative. Should the NTEU wish to have a representative present at any formal discussion between Mr. Guinn and NRC officials regarding this grievance, such will be permitted. Please be advised that the above interpretation applies to any subsequent grievances filed by the Union under 4157. . ."

On March 4, 1981, Thomas sent Miller the following Memorandum on Union stationery:

"I received on this date a memorandum from Paul Bird, Director of Personnel, indicating that it is the NRC's position that the February 19, 1981 formal agency grievance appeal which I filed with you on behalf of Paul Guinn is improper. The basis for this assessment is that 4157, Part B.3 precludes Unions from filing agency grievances on behalf of employees. While I personally disagree with this interpretation, I am forced to follow it. Therefore, please consider this memorandum as a modification of the February 19 grievance appeal which deletes all references to Union

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representation and inserts the phrase personal representative in its place.

"Please be further advised that Chapter 208 is following this management directive under protest. As such, we do not forfeit any right to appeal the management decision to preclude Union representation in agency grievances.

"Finally, now that the matter of Union representation on this case has been resolved, I would appreciate your complying with my request for a prompt response to the grievance appeal, if at all possible."

Thomas signed the document as "President, NTEU Chapter 208."

On March 18, 1981 "key line official" Miller denied Guinn's grievance. Miller's memorandum was addressed to Thomas as President of NTEU Chapter 208 and indicated it was a response to "the grievance you filed on behalf of Paul Guinn . . ." also refers to the Guinn grievance as "your grievance."

Thomas appealed Miller's denial of Guinn's grievance to the Division Director. The appeal, written on plain letterhead on March 26, 1981 and signed by Thomas, President, NTEU Chapter 208 stated, inter alia:

"Pursuant to NRC Manual and Appendix 4157, I wish to appeal the March 18, 1981 denial of the formal agency grievance filed on behalf of Paul Guinn on February 19, 1981 and amended on March 4, 1981. Please be advised that I am acting as Mr. Guinn's personal representative in this matter under protest; NTEU Chapter 208 maintains that the Union should be allowed to represent employees in the bargaining unit as an entity and not be required to designate personal representatives. This information is not being furnished as an issue in this grievance but merely to preserve our right to contest management's decision to disallow Union representation to bargaining unit employees at a later date."

The record does not disclose any further communication between the parties regarding this matter.

The next grievance considered was that involving employee Jack Bell which was initiated on February 23, 1981. Chief Steward Martin Levy represented Bell and the record reveals that Levy's correspondence to management was written on Union stationery and signed by Levy as Chief Steward, NTEU Chapter 208. In one of those letters Levy stated that

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". . . it is our understanding that based on the Civil Service Reform Act of 1978, a union official has a right to represent a bargaining unit employee and to do so as a union official." However, the grievance involved two separate matters; one dealing with a non-selection issue under the agency procedure and the other concerning the proper "key line official" under the negotiated Interim Agreement and it is not clear as to what Levy's comment regarding the rights of Union officials apply. Respondent's subsequent correspondence to Levy addressed him as Chief Steward of NTEU Chapter 208, but in correspondence of August 26, 1981 to Chapter 208 President, James Thomas from one of Respondent's attorneys' concerning this matter, the attorney referred to a previous meeting of July 30 wherein Thomas and Levy acted as personal representatives for Bell and Paul Guinn, who also had a grievance under consideration at the time. At some undisclosed time when the Bell grievance involved a proceeding before Judge Greg, who I assume was a Grievance Examiner, Levy identified himself as Bell's personal representative.

The sixth supervisory selection grievance concerned employee John Nehemias. On June 19, 1981 a formal written grievance was filed with Respondent under Union letterhead by Lynne O'Reilly, who identified herself as a steward for NTEU Chapter 208. O'Reilly indicated in the grievance that Nehemias requested she represent him in the matter. The grievance was resolved informally. The agency's covering memorandum returning the grievance to O'Reilly on July 9 identified O'Reilly as a personal representative and did not refer to her as a steward.

The seventh grievance involved employee Peter Hearn and was submitted on August 17, 1981 by steward Leah Tremper in the same manner as the Nehemias grievance. Management's response to Tremper of October 2, 1982 and a subsequent notification of the scheduling of a hearing in the matter identified Tremper as steward for NTEU Chapter 208. When Respondent notified Tremper on April 19, 1982 of its final disposition of the matter, it referred to Tremper only as "personal representative."

The eighth grievance concerned employee Leonard Gordon and was filed by steward Martin Levy on September 10, 1981, again, in the same manner as the prior two grievances considered herein. Management's response to Levy on October 7, 1981 referred to Levy only as "personal representative" as did management's notification to Levy of its final disposition of the matter on January 26, 1982.

The last grievance processed under Manual Chapter 4157 was filed on July 16, 1981 by steward Teresa Barnhart on behalf of employee Gary Staley. This grievance was filed in the same format as the prior three grievances, above. Management's first response to Barnhart identified her as steward for NTEU Chapter 208. An interim decision by management was adverse to Staley and by memorandum of September 4, 1981, under Union letterhead and signed by Barnhart as steward for NTEU Chapter 208, Barnhart took issue with the decision. In the text of the memorandum Barnhart stated she was appealing the decision "as personal

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representative and Union Steward for Gary B. Staley." The matter went to hearing before an examiner at which time Barnhart was referred to and acted as Staley's "personal representative" and Chief Steward Martin Levy was referred to as "the Union's representative."5/ Management's final disposition of the matter was transmitted to Barnhart on February 3, 1982, and identified Barnhart only as "personal representative."

On June 4, 1982 Steward Allen Brodsky filed a written supervisory selection grievance under Manual Chapter 4157 on behalf of James Martin in the same format as the prior four grievances. On June 14, 1982 Greg Benoit, Respondent's Chief of Labor Relations Branch, sent the following memorandum to Brodsky:

> "This is to inform you that we are rejecting the grievance you filed, dated June 4, 1982, on behalf of Mr. James A. Martin, Jr. We are rejecting this grievance because we feel it is a conflict of interest for a potential SES member to be represented by the National Treasury Employees Union (NTEU). It is our feeling that if you were to prevail in Mr. Martin's behalf he would be beholden to you personally and to the NTEU. We feel it would be improper for a member of the SES to have an indebtedness to NTEU.
>
> "We will allow Mr. Martin 10 days from the date of your receipt of this memorandum to refile his grievance represented by someone other than an NTEU Steward or officer."

Union President Thomas strongly objected to Respondent's action and by memorandum of July 2, 1982 to Thomas, Beniot re-asserted and further supported management's position on excluding Union representation in grievances involving selections for supervisory positions.

Discussion

As stated above, Counsel for the General Counsel contends that prior to June 14, 1982 a practice existed whereby Union stewards, in their capacity as Union officials, were permitted to represent employees in supervisory selection grievances. It is well settled that in order to establish a term and condition of employment by practice, under the Statute the practice must have been consistently exercised for a substantial period of time with the employer's knowledge and consent. Department of the Navy, Naval Underwater Systems Center, Newport Naval

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5/ As noted hereinbefore, Section B.1.d. of NRC Manual Chapter 4157 permits the Union to be represented at formal proceedings concerning such grievances.

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Base, 3 FLRA 413 (1980); and Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA 229 (1982).

In the case herein, while the evidence relative to the Mitchell grievance (the first) may tend to support the General Counsel's contention, the next grievance (Snell) is more ambiguous. In the Snell grievance the Union steward is identified both as "steward" and "personal representative" and it does not appear that during the processing of this matter the Union ever clearly and expressly declared its intention to management that the Union was representing employees through its steward.

The next grievance (Costello) was also initiated in a somewhat ambiguous manner. However, during the processing of the following grievance, that involving employee Guinn, the Union, qua Union, clearly disclosed its intention to act as the employee's representative in the grievance. Respondent's reaction was equally clear. Thus, Respondent on March 1, 1981 specifically rejected Union representation of Guinn, although Respondent obviously had no objection to Union stewards representing employees as "personal representatives" and on March 4 the Union acceded to Respondent's position, albeit under protest. Chief Steward Levy's March 13, 1981 memorandum to Respondent when processing the Costello grievance recognized that Respondent's Labor Relations Branch was sensitive to the Union acting in a representational capacity for employees when the agency grievance procedure was invoked and Levy indicated he was representing Costello as Union Chief Steward or as Costello's personal representative, whichever would be acceptable to Respondent, again under protest. Management's subsequent communication to Levy addressed him as Costello's "personal representative," thus indicating it was rejecting Union representation in the matter. Thereafter, Respondent's conduct in all the following grievance proceedings was consistent with this practice and Union stewards, although referring to themselves as stewards, never again indicated they were claiming to representing employees in their capacity as officials of the Union or that the Union, qua Union, was representing the individuals.

In view of the foregoing, I find that the standards set by the Authority for finding the existence of a practice, Department of the Navy, supra and Social Security Administration, supra, have not been met and accordingly, I conclude that the evidence is insufficient to establish that a practice of allowing the Union or Union stewards, as Union officials, to represent employees in Manual Chapter 4157 proceedings concerning supervisory selections ever existed. In any event, I find that if such a practice existed it was discontinued on March 1, 1981. Since no unfair labor practice charge concerning the discontinuance was filed within 6 months of such action, I conclude the matter is not a proper subject for litigation herein by virtue of the provisions of section 7118(a)(4)(A) of the Statute, supra.

I further find and conclude, as indeed Respondent admits, that prior to June 14, 1982 a practice existed whereby Union stewards were permitted

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to represent unit employees as personal representatives in supervisory selection grievances under the agency grievance procedure.

However, Respondent contends that it was privileged to unilaterally discontinue the practice. Respondent argues that supervisory selection procedures are not working conditions within the meaning of the Statute and accordingly, it had no duty to bargain with the Union prior to changing its policy in the matter. Respondent relies upon the ruling of the Authority in International Association of Fire Fighters, Local F-16 and Philadelphia Naval Shipyard, 3 FLRA 438 (1980), and a line of cases which follow this case.6/ Although, not obligated to bargain on the matter, Respondent acknowledges that it is not prohibited from doing so and may elect to bargain on supervisory selection procedures if it so chooses. Nevertheless, Respondent avers that it has never bargained with the Union on grievance procedures concerning supervisory selections and points to record testimony which reveals that at some undisclosed time during negotiations which led to the 3-year collective bargaining agreement which was signed by the parties on April 15, 1981, the Union proposed that supervisory selection procedures be included in the negotiated agreement and Respondent refused to negotiate on the issue. Further, Respondent contends that bargaining unit employees cannot gain any collective rights in areas outside their working conditions except by contract and since no contractual right in the matter at issue herein exists, Respondent had no duty to bargain before changing its policy.

In the Philadelphia Naval Shipyard case, supra, and numerous cases decided thereafter, the Authority has held that promotional procedures applicable to nonbargaining unit supervisory positions were negotiable only at the election of the agency involved. The Authority reasoned that since the duty to bargain under the Statute extends only to conditions of employment of bargaining unit employees, and under the Statute supervisors are excluded from inclusion in collective bargaining units, an agency is not obliged to bargain with a union on promotion procedures for filling nonbargaining unit supervisory positions.

The Authority more fully explicated its rationale in a prior case, National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor, Washington, D.C., 3 FLRA

6/ Hawaii Federal Employees Metal Trades Council and Department of the Navy, Navy Public Works Center, Pearl Harbor, Hawaii, 4 FLRA No. 3 (1980); American Federation of Government Employees, AFL-CIO, Local 2 and Department of the Army, Military District of Washington, 4 FLRA No. 60 (1980); Office of Program Operations, Field Operations, SSA San Francisco, 5 FLRA No. 45 (1981); American Federation of Government Employees, AFL-CIO, Local 909 and Department of the Army, Headquarters, Military Traffic Command, Washington, D.C., 6 FLRA 502 (1981); and others.

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290 (1980). In that case a Union, during contract negotiations, proposed that competitive procedures in the agency's Merit Promotion Plan be utilized when filling supervisory or management positions with bargaining unit employees. The Authority held the proposal was outside the agency's duty to bargain under the Statute, explaining:

> ". . . The proposal puts conditions on filling supervisory and management positions which are outside the unit and may not be included in appropriate units by operation of section 7112(b)(1) of the Statute. An exclusive representative's obligation and correlative rights, however, extend only to employees in the unit, under section 7114(a)(1). Furthermore, the definition of "collective bargaining" found in section 7103(a)(12) . . . restricts the scope of the obligation to bargain in good faith to matters affecting the conditions of employment of employees in an appropriate unit. Consequently, the agency has no obligation to bargain over matters relating to the non-bargaining unit positions referred to in the proposal. Thus, as the proposal goes beyond the representation rights of the exclusive representative and does not directly relate to conditions of employment of unit employees, it is outside the duty to bargain under the Statute." (Footnote omitted.)

Clearly then, under the Statute procedures for filling supervisory positions, including unilaterally making changes in those procedures, are matters outside an employer's duty to bargain since such procedures concern nonbargaining unit positions. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 11 FLRA 316 (1983). In my view the procedure to challenge the selection of supervisors, such as the agency grievance procedure herein, similarly is not a matter over which an employer is obligated to bargain. Such grievance procedure, including who may represent a grievant in the proceeding, is an integral part of and so closely related to the selection procedure itself as to require being accorded the same treatment and consideration as the selection procedure. Accordingly, I conclude Respondent had no obligation to bargain with the Union as to what role the Union would have in agency procedures to challenge supervisory selections or who would be allowed to represent employees in those procedures.

However, while Respondent was not obligated to bargain with the Union on the matter, it was not precluded from bargaining if it so desired and could thereby provide the Union with rights it would not ordinarily possess but for Respondent's relinquishment of those rights. Thus, Respondent was free to bargain away its right to unilateral control over who would represent employees when challenging supervisory selections.

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The scope of the concept of what constitutes "bargaining" under the Statute has not yet been fully defined. However, a contention that in "negotiations" a union must make a specific proposal and discussions must somehow lead to a written contract has been rejected as being ". . . too limited an interpretation that would frustrate meaningful negotiations in favor of some sort of stylized form of communication." Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, North Atlantic Region, (New York, New York), 8 FLRA 296 at 304 (1982). Indeed, it is not uncommon that all "bargaining" between parties on a matter takes place through an exchange of correspondence, with no face-to-face meetings having ever occurred. Further, a "bargaining obligation" can be breached in situations where no contract or agreement is envisioned but information is sought by a union, and an employer refuses to produce the information. Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982); Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California, 8 FLRA 547 (1982); and Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA 480 (1982). The issue in Veterans Administration, Denver, supra, concerned an employer's obligation to furnish information requested by a Union related to the processing an employee's grievance. The Authority held that the duty of an agency to "negotiate" in good faith with a union as required by section 7114(a)(1) of the Statute includes the obligation to furnish such information. Thus, the Authority has clearly recognized that the words "bargain" and "negotiate" have an expansive meaning and are to be applied to situations beyond that of mere face-to-face exchanges of proposals at the conclusion of which the parties anticipate the execution of a written document.

In the case herein Union stewards represented all unit employees who grieved their non-selection for supervisory positions from the time the Union became the exclusive collective bargaining representative in November 1978 until Respondent unilaterally refused to permit such representation in June 1982, and Respondent was aware that stewards were representing employees in these grievances. After the Union obtained its exclusive representation status, Respondent engaged in a course of conduct which clearly and unmistakably reflected a practice or policy of dealing with the Union to the limited extent of permitting stewards to act as personal representatives for unit employees in supervisory selection grievances. Respondent could have refused to allow such representation. In March 1981 with regard to recognizing the Union, qua Union, as a representative of employees in these proceedings it unequivocally refused to permit such representation. Nevertheless, Respondent opted to deal with stewards and permit their appearance as personal representatives. The issue of steward representation of employees was clearly put in contention during the grievances concerning employees Paul Guinn and Costello. When Respondent rejected the December 16, 1980 grievances concerning Guinn, steward Levy was explicitly advised that he could not represent Guinn as a Union steward, supra. Later in March 1981 when dealing with Guinn's grievance, Union President Thomas was advised that the Union could not represent Guinn but the letter permitted Thomas,

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also a steward, to represent Guinn as a personal representative. Although "under protest", the Union accepted Respondent's position on the matter and thereafter, during the Guinn and Costello grievances, and five succeeding grievances over the next 15 months, stewards consistently acted as personal representative in supervisory selection grievances and Respondent fully recognized and unequivocally dealt with them on the grievances.

In my view such conduct on Respondent's part was tantamount to having bargained with the Union concerning steward's representation. During the Guinn grievance the issue of the Union's role in these supervisory selection grievances was clearly joined, the parties expressed their positions on the subject and the matter was resolved by a procedure obviously agreeable to both parties: the Union acquiesced, albeit under protest, to Respondent's position precluding Union representation of employees and Respondent permitted stewards to represent employees as their personal representatives. That resolution consistently governed the succeeding five grievances during the following 15-month period. Further, such representation by stewards was not contrary to the language of Manual Chapter 4157 whereby employees were permitted to choose their own representatives in these proceedings.7/ Thus, while Respondent may not have been obligated to bargain with the Union on permitting stewards to act as personal representatives in processing grievances under the agency procedures, I find and conclude that its actions indicated it in fact "bargained" with the Union within the meaning of the term "bargain" as used by the Authority in Philadelphia Naval Shipyards, supra, and cases following thereafter.

Accordingly, I conclude that Respondent, before terminating the practice of stewards representing employees as personal representatives in supervisory selection grievances, was obligated to provide the Union with adequate notice and an opportunity to bargain about the discontinuance of the practice and the procedures which management officials would observe in discontinuing the practice and appropriate arrangements for employees adversely affected by such action. I further conclude that by its failure to give the Union adequate notice and an opportunity to bargain concerning the change, Respondent violated section 7116(a)(1) and (5) as alleged.

7/ During the hearing testimony was received which revealed that Manual Chapter 4157 was "revised" on November 29, 1982, but no indication was given as to the nature of the revision or if it might impact on the issues presented herein. Accordingly, I make no findings or conclusions regarding this matter.

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Remedy

Counsel for the General Counsel and counsel for the Union contend that a status quo ante order is appropriate in this case. I agree.

Prior to Respondent's refusal to permit representation by Union stewards in June 1982, stewards represented every employee who grieved supervisory non-selection. Respondent's refusal clearly conveyed that representation by stewards would not be permitted in the future and to so request would indeed be a futile act. Accordingly, regardless if requested after June 1982, I infer that grieving employees would have selected stewards to represent them in such matters but for Respondent's conduct and I will treat all Manual Chapter 4157 proceedings after June 1982 as voidable at the discretion of the aggrieved employee if the employee desires representation by a steward. If voided, the matter will then be re-processed and if the grievant is successful, Respondent will make the grievant whole for any loss of earnings or benefits suffered from the time the grievant initially failed in the prior non-selection grievance when deprived of a Union steward to act as the grievant's personal representative.

In view of the entire foregoing I recommend that the Authority issue the following:

ORDER

Pursuant to section 2430.20 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Nuclear Regulatory Commission shall:

1. Cease and desist from:

   (a) Refusing to permit Union stewards, designated as "personal representatives," from representing unit employees when the employees grieve their non-selection for supervisory positions in Manual Chapter 4157 proceedings without first affording National Treasury Employees Union, the employees exclusive collective bargaining representative, notice and an opportunity to bargain, consonant with the obligations imposed by the Statute, concerning any proposed change in such practice.

   (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the memorandum of June 14, 1982 to Union Steward Allen Brodsky and the memorandum of July 2, 1982 to Local 208 President James Thomas regarding the rejection of grievances where Union stewards are selected by employee grievants to represent them in Manual Chapter 4157 proceedings involving employees' non-selection for supervisory positions.

(b) Upon request, recognize Union stewards designated as "personal representatives" of unit employees when employees grieve their non-selection for supervisory positions in Manual Chapter 4157 proceedings.

(c) Upon request of any aggrieved unit employee, rehear the grievance of employee Gary Staley and any grievance brought after June 14, 1982 in a Manual Chapter 4157 proceeding concerning the employee's non-selection for a supervisory position, where the employee designates a Union steward as his "personal representative" and, if successful in the grievance, make the grievant whole for any loss of earnings or benefits suffered.

(d) Post at all its facilities wherein unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Executive Director for Operations of the Nuclear Regulatory Commission and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Executive Director shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, Washington Regional Office, P. O. Box 33758,

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Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 13, 1983
Washington, DC

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to permit Union stewards, designated as "personal representatives, from representing unit employees when the employees grieve their non-selection for supervisory positions in Manual Chapter 4157 proceedings without first affording the National Treasury Employees Union, the employees exclusive collective bargaining representative, notice and an opportunity to bargain, consonant with the obligations imposed by the Statute, concerning any proposed changes in such practice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the memorandum of June 14, 1982 to Union Steward Allen Brodsky and the memorandum of July 2, 1982 to Local 208 President James Thomas regarding rejection of grievances where Union stewards are selected by employee grievants to represent them in Manual Chapter 4157 proceedings involving employees' non-selection for supervisory positions.

WE WILL, upon request, recognize Union stewards designated as "personal representatives" of unit employees when employees grieve their non-selection for supervisory positions in Manual Chapter 4157 proceedings.

WE WILL, upon request of any aggrieved unit employee, rehear the grievance of employee Gary Staley and any grievance brought after June 14, 1982 in a Manual Chapter 4157 proceeding concerning the employees's non-selection for a supervisory position, where the employee

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designates a Union steward as his "personal representative" and, if successful in the grievance, make the grievant whole for any loss of earnings or benefits suffered.

_____
(Agency/Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority whose address is: Washington Regional Office, P. O. Box 33758, Washington, D.C. 20033-0758; and whose telephone number is: (202) 653-8507.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3769

Union

and

Case No. 0-AR-961

FEDERAL GRAIN INSPECTION SERVICE

Agency

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator John J. Maxwell filed by Mr. Charlie Horton, Jr., the grievant in the above-entitled case. For the reasons set forth below, the exceptions must be dismissed.

Section 2425.1(a) of the Authority's Rules and Regulations provides:

> Either party to an arbitration under the provisions of chapter 71 of title 5 of the United States Code may file an exception to an arbitrator's award rendered pursuant to the arbitration.

Section 2421.11 of the Rules and Regulations provides in pertinent part:

> "Party" means (a) any person . . . (4) who participated as a party . . . (ii) in a matter where the award of an arbitrator was issued. . . .

In this case it appears that two parties, the Union and the Agency, participated as "parties" in the subject proceeding. Thus, it does not appear that Mr. Horton, the grievant, participated as a "party" in the proceeding before the arbitrator. Consequently, the grievant is not entitled to file exceptions to the arbitrator's award under section 2425.1(a) of the Authority's Regulations.

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Accordingly, and apart from other considerations, the grievant's exceptions are hereby denied.

For the Authority.

Issued, Washington, D.C., May 13, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF EDUCATION,
DIVISION OF CIVIL RIGHTS,
ATLANTA, GEORGIA

Activity

and

Case No. O-AR-688

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION NO. 3887
ATLANTA, GEORGIA

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Ralph Roger Williams filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The parties submitted to arbitration the issue of whether the Activity's denial of a within-grade increase to the grievant was in violation of the parties' collective bargaining agreement. The Arbitrator ruled that the Activity had violated the agreement because the Activity had failed to sustain by a preponderance of the evidence that the disputed aspects of the grievant's work were not being performed at an acceptable level of competence (the negative determination). The Arbitrator found that grievant's work product met acceptable standards and consequently allowed the grievance and granted the grievant the within-grade increase retroactively.

In its first exception the Agency contends that the award is contrary to law. The Authority however concludes that the Agency fails to establish that the award is deficient.

The Authority has uniformly held that in order for an award of backpay to be authorized under the Back Pay Act, 5 U.S.C. § 5596, there must be not only a determination that the aggrieved employee was affected by an unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee would otherwise have earned

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or received. E.g., American Federation of Government Employees, Local 51 and U.S. Department of the Mint, Old Mint Building, Customer Service Division, 15 FLRA No. 164 (1984). In addition, with respect to the denying or withholding of a within-grade increase, the Authority has recognized under 5 U.S.C. § 5335(a) that in order for an employee to be entitled to the increase, the work of the employee must be determined to be at an acceptable level of competence. Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA No. 76 (1984). Thus, in order for an award by an arbitrator of a retroactive within-grade increase to be authorized, the arbitrator must find that agency action in connection with the withholding or denying of the increase was unwarranted and that but for the unwarranted action, the grievant otherwise would have received the within-grade increase. In this regard, the arbitrator must find either that the negative determination was not sustained or that due to some action or failure to take action on the part of the agency, the work of the grievant was determined not to be at an acceptable level of competence when it otherwise would have been. See id. at 2. In terms of this case, as has been noted, the Arbitrator on finding a violation of the agreement, constituting the unjustified or unwarranted personnel action, further found that the negative determination had not been sustained and that the grievant's work met acceptable standards. Thus, the Arbitrator effectively found that but for the unwarranted action, the grievant otherwise would have received the within-grade increase. Consequently, the Arbitrator made the findings necessary for a proper award of a retroactive within-grade increase. In its exception in this respect, the Agency, however, has argued that these findings were based on the Arbitrator's determination that the Activity had failed to sustain the negative determination by a preponderance of the evidence, a standard the Agency contends is contrary to law. Citing to 5 U.S.C. § 7701(c)(1),1/ the Agency claims that the standard of proof required in cases challenging the denial of a within-grade increase is substantial evidence. With the Arbitrator affirmatively finding that the "Grievant's work performance met acceptable standards," it is not clear, however, as maintained by the Agency, that the award is based only on the negative determination not having been sustained by a preponderance of the evidence. Nevertheless, the Agency in any event fails to establish that

1/ Section 7701(c)(1) pertaining to the appellate procedures of the Merit Systems Protection Board provides:

> (c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-
>
> > (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
> >
> > (B) in any other case, is supported by a preponderance of evidence.

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the award is deficient because the Arbitrator was required by law to apply the standard of substantial evidence.

In this regard the Authority has previously held that section 7701(c) expressly pertains only to the appellate procedures of the Merit Systems Protection Board (MSPB) in reviewing agency decisions in any action appealed to MSPB and that accordingly section 7701(c) is not applicable to grievances submitted to arbitration. E.g., Naval Weapons Station, Yorktown, Virginia and National Association of Government Employees, Local R4-96, 13 FLRA 133 (1983). At the same time, the Authority recognized that under section 7121(e)(2) of the Statute,[2/] an arbitrator in certain matters is governed by the standards set forth in section 7701(c). However, that section of the Statute does not pertain to the denying or withholding of within-grade increases and therefore neither that section nor the standards set forth in section 7701(c) apply in this case. Consequently, contrary to the contention of the Agency, no specific standard of proof is required by law and the Authority has held that unless a specific standard of proof is required, an arbitrator may establish whatever standard the arbitrator considers appropriate and the award is not subject to being found deficient on that basis. Department of Defense Dependent Schools, Europe and Overseas Education Association, 4 FLRA 412 (1980). Furthermore, with such arbitrations not being subject to judicial review by the U.S. Court of Appeals for the Federal Circuit under section 7121(f) of the Statute,[3/] the Agency additionally has failed to establish that section 7701(c)(1) requires the application of the standard of substantial evidence to denials of within-grade increases. Although that is the standard determined by MSPB and the U.S. Court of Appeals for the Federal Circuit to be required by section 7701(c)(1), Parker v. Defense Logistics Agency, 1 MSPB 489 (1980); Gordon v. Veterans Administration, No. 84-1327 (Fed. Cir. Dec. 11, 1984), three other U.S. courts of appeal have held that the standard of preponderance of the evidence of section 7701(c)(1)(B) applies to denials of within-grade increases. Ommaya v. National Institutes of Health, 726 F.2d 827 (D.C. Cir. 1984); White v. Department of the Army, 720 F.2d 209 (D.C. Cir. 1983); Stankis v. EPA, 713 F.2d 1181 (5th Cir. 1983); Schramm v.

2/ Section 7121(e)(2) provides: "In matters covered under sections 4303 and 7512 of [title 5] which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of [title 5], as applicable."

3/ Section 7121(f) pertinently provides:

> In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board.

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Department of Health and Human Services, 682 F.2d 85 (3d Cir. 1982). Accordingly, for these reasons this exception provides no basis for finding the award deficient.

In its other exceptions the Agency contends that the Arbitrator exceeded his authority by applying the standard of preponderance of the evidence because the parties had agreed that the Arbitrator was to apply the standard of substantial evidence, and that the Arbitrator failed to conduct a fair hearing if he considered the decision in Stankis v. EPA, 713 F.2d 1181 (5th Cir. 1983) because a copy of the decision was forwarded by the Union after the record before the Arbitrator was closed. The Authority concludes that the Agency in these exceptions fails to provide a basis for finding the award deficient. The Agency fails to establish that the parties had agreed that the Arbitrator was to apply the standard of substantial evidence. The Agency also fails to establish that the Arbitrator in any manner denied the Activity a fair hearing.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C. May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE DEPENDENTS
SCHOOLS, PACIFIC REGION

Activity

and

OVERSEAS EDUCATION ASSOCIATION

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Ted T. Tsukiyama filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.

According to the record before the Authority, this case arose when there was a reduction in the number of industrial arts teaching positions at a high school of the Activity. As a result the grievant, an industrial arts teacher and an area director of the Union, received an advance notice of separation by reduction-in-force and ultimately was transferred to a teaching position at another high school of the Agency. After receiving the notice, the grievant in his representative capacity as area director filed an unfair labor practice charge claiming that the Activity had violated section 7116(a)(1) and (2) of the Statute by proceeding to eliminate the teaching position of an employee, the grievant, acting in the capacity as a representative of a labor organization. After investigation the Authority's Regional Director determined not to issue a complaint because there was no evidence of conduct motivated by consideration of the grievant's union activities. Approximately one week later, the Union requested to withdraw the charge and the Regional Director rescinded his determination not to issue a complaint and approved the withdrawal. Approximately another week later, the grievant filed the grievance in this case claiming that the abolishing of his position was in violation of the parties' collective bargaining agreement, principally Article 2, Section 3,[1/] as a reprisal for his union activities. At

1/ At all relevant times, Article 2, Section 3 of the parties' collective bargaining agreement pertinently provided:

(Continued)

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arbitration the Activity claimed that under section 7116(d) of the Statute[2/] and under the parties' collective bargaining agreement, the dispute before the Arbitrator was precluded from being raised as a grievance because of the earlier-filed unfair labor practice charge. The Arbitrator however determined that the grievance was arbitrable by finding that it was not barred by the agreement and by ruling that he was not authorized to apply section 7116(d) of the Statute. On the merits the Arbitrator found that the disputed actions were prompted and motivated by consideration of the grievant's union activities in violation of provisions of the parties' agreement which the Arbitrator noted were drawn directly from section 7102 of the Statute protecting union activity. Accordingly, the Arbitrator sustained the grievance and ordered the grievant reinstated to his restored former teaching position with backpay.

As one of its exceptions, the Agency essentially contends that the award is contrary to section 7116(d) of the Statute.

Section 7116(d) effectively provides that when in the discretion of the aggrieved party, an issue has been raised under the unfair labor practice procedures, the issue subsequently may not be raised as a grievance. Thus, the elements of section 7116(d) which must attach in order for a grievance to be precluded are: (1) the issue which is the subject matter of the grievance is the same as the issue which is the subject matter of the unfair labor practice; (2) such issue was earlier raised under the unfair labor practice procedures; and (3) the selection of the unfair labor practice procedures was in the discretion of the aggrieved party. In terms of this case, the Authority concludes that the Agency has established that all the elements of section 7116(d) attached and that consequently the dispute before the Arbitrator was precluded by the Statute from being raised as a grievance.

(Continued)

> Each teacher has the right, freely and without fear of penalty or reprisal, to form, join, and assist the Association and shall be protected in the exercise of this right. Management shall ensure that teachers are apprised of their rights, and that no interference, restraint, coercion or discrimination is practiced within DODDS to encourage or discourage membership in the Association.

2/ Section 7116(d) of the Statute pertinently provides:

> [I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

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Specifically, the Agency has established that the issue which was the subject matter of the unfair labor practice charge is the same as that which is the subject matter of the grievance. See, e.g., Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California, 13 FLRA 631 (1984). As noted, the unfair labor practice charge alleged that by proceeding to eliminate the teaching position of the grievant, a union representative, the Activity violated section 7116(a)(1) and (2) of the Statute, and the grievance alleged that by abolishing the grievant's position as a reprisal for his union activities, the Activity violated the parties' collective bargaining agreement, principally the provision restating nearly verbatim the employees' rights provisions of section 7102 of the Statute. Thus, the Authority finds that the issue raised both by the charge and the grievance was the same: whether the Activity's actions were motivated by consideration of the grievant's union activities in violation, either directly or derivatively, of employees' rights under the Statute. It is further established that such issue was earlier raised under the unfair labor practice procedures by the filing of the unfair labor practice charge. Under the terms of section 7116(d), the filing of the charge rather than the subsequent action of withdrawing the charge and filing the grievance constitutes the determinative factor as to when the election of procedures in this case was exercised. See Headquarters, Space Division, Los Angeles Air Force Station, California and American Federation of Government Employees, Local 2429, 17 FLRA No.131 (1985). Finally, it is likewise established that the selection of the unfair labor practice procedures was in the discretion of the grievant, the aggrieved party. Contrary to the argument of the Union, this use of "party" in section 7116(d) does not require identity of filing parties in order for this element of the preclusion to attach. Section 7116(d) does not reference filing party, but rather references "in the discretion of the aggrieved party," the party by whose choice the particular procedures are selected. Accordingly, this element of section 7116(d) attaches when the choice of particular procedures has been made by the aggrieved party regardless of who is formally the filing party. Thus, the Authority finds that the filing of the unfair labor practice charge by the grievant in his representative capacity was on his own behalf and constituted his election as the aggrieved party of the unfair labor practice procedures. See Internal Revenue Service, Chicago, Illinois, 3 FLRA 479 (1980) (In this case the Authority adopted and expressly approved the judge's ruling that the complaint issued on a charge filed by the union was precluded under section 7116(d) by a grievance which had been filed earlier by individual employees. The judge had concluded that although the union was the charging party, the aggrieved parties were the individual employees and they had earlier elected to raise the disputed issue as a grievance.); cf. United States Air Force, Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio, 4 FLRA 512 (1980) (In this case the Authority expressly adopted the judge's ruling that the complaint issued on a charge filed by the union was not precluded under section 7116(d) by a grievance the union had earlier filed. In this regard the judge had concluded that the grievance had been filed by the union in a representative capacity on behalf of the aggrieved employee while the unfair labor practice charge had been filed by the union in its institutional capacity as the bargaining representative of employees and the aggrieved party.).

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In sum, there was an election in this case in the discretion of the aggrieved party to raise the disputed matter under the unfair labor practice procedures. In this regard the clear purpose and effect of section 7116(d) is to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party. Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA 480 (1982); Internal Revenue Service, Chicago, Illinois, 3 FLRA 479 (1980). Thus, the matter in dispute in this case was prohibited from being relitigated under the grievance procedure, and consequently the grievance before the Arbitrator was precluded by the Statute from consideration. For these reasons, the award is deficient as contrary to section 7116(d) of the Statute and is set aside.3/

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In view of this decision, it is not necessary to address the Agency's other exceptions.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY'S OFFICE
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 8-CA-30518

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 62

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts, accompanying exhibits, and the contentions of the parties, the Authority finds:

The complaint alleges that the Respondent refused to comply with the requirements of section 7115(a) of the Federal Service Labor-Management Relations Statute (the Statute)[1/] by failing to implement in a timely manner the written dues withholding authorizations of certain bargaining

1/ Section 7115(a) provides in pertinent part:

§ 7115. Allotments to representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment[.]

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unit employees and the Union's written request to increase bargaining unit employees' dues allotments, thereby violating section 7116(a)(1) and (8) of the Statute.2/

The Respondent and the Charging Party are parties to a collective bargaining agreement which contains a dues withholding provision. The procedures for dues withholding are set forth in a November 24, 1971 agreement which is incorporated by reference into the collective bargaining agreement. The parties stipulate that this incorporated agreement cannot be located.

Three bargaining unit employees signed dues withholding authorizations in February 1983. On or about March 16, 1983, the Union submitted the authorizations to Patricia McCormick, the Respondent's Employee Development Specialist. The Union also submitted a written request to increase the union dues allotments from $3.00 to $4.00, to be effective with the pay period commencing March 27, 1983. Thereafter, Ms. McCormick attempted, on several occasions, to submit the requests to the payroll office. The dues increase request was not implemented by the payroll office until the pay period ending on June 25, 1983, and the dues withholding authorizations were not implemented until the pay period ending on September 17, 1983.

In previous decisions, the Authority has held, pursuant to section 7115(a) of the Statute, that dues withholding authorizations and dues allotment increase requests must be processed expeditiously. Unreasonable delay, even if unintentional, was found violative of section 7116(a)(1) and (8) of the Statute. See Department of Health and Human Services, Social Security Administration, 13 FLRA 625 (1984) and Department of Health and Human Services and Social Security Administration, Region IX, San Francisco, California, 12 FLRA 250 (1983). The Authority concludes

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2/ Section 7116(a) provides in pertinent part:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

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that the three and six month delays, respectively, were unreasonable in the circumstances of this case.3/ Thus, the Authority finds that the Respondent failed to comply with the requirements of section 7115(a), thereby violating section 7116(a)(1) and (8) of the Statute.

Accordingly, having found that the Respondent violated section 7116(a)(1) and (8) of the Statute, the Authority shall order the Respondent to reimburse the Union in an amount equal to the dues the Union would have received but for the unlawful failure to timely honor the employees' dues withholding authorizations and the Union's request to increase the dues allotments.4/

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of Justice, United States Attorney's Office, Los Angeles, California, shall:

1. Cease and desist from:

(a) Failing to timely honor the written dues withholding authorizations of bargaining unit employees, or failing to remit their union dues to the National Federation of Federal Employees, Local 62, the exclusive representative of the unit employees, as required by the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute.

(b) Failing to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by failing to implement in a timely manner an authorized written request to increase unit employees' basic dues allotments.

3/ The Authority rejects the Respondent's contention that the duty to process the requests did not arise until the requests were received by the payroll office. The Statute requires compliance once the "agency" has received written authorization. In this case the Respondent's Employee Development Specialist received the authorization. The Authority concludes, in these circumstances, that the "agency" did receive the proper authorization and failed to timely process the requests.

4/ Notwithstanding the fact that one of the employees involved in this dispute terminated her employment with the Respondent on February 18, 1984, subsequent to the violations in this case, the Authority agrees with the General Counsel that reimbursement of this employee's dues is warranted.

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(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Pay to the National Federation of Federal Employees, Local 62, the union dues of Stephen Carlisle, Elenor Clark, and Dongsook Kim Smoot for the period March 27, 1983 through September 17, 1983.

(b) Reimburse the National Federation of Federal Employees, Local 62, in an amount equal to the regular and periodic dues it would have received from the pay period beginning March 27, 1983 to June 25, 1983, but did not receive as a result of the unlawful delay in implementing the authorized request to increase the unit employees' basic dues allotments.

(c) Post at its Los Angeles, California office, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by authorized representatives of the Respondent and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to timely honor the written dues withholding authorizations of bargaining unit employees, or fail to remit their union dues to the National Federation of Federal Employees, Local 62, the exclusive representative of the unit employees, as required by the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute.

WE WILL NOT fail to comply with the provisions of section 7115(a) of the Federal Service Labor-Management Relations Statute by failing to implement in a timely manner an authorized written request to increase unit employees' basic dues allotments.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL pay to the National Federation of Federal Employees, Local 62, the union dues of Stephen Carlisle, Elenor Clark, and Dongsook Kim Smoot for the period March 27, 1983 through September 17, 1983.

WE WILL reimburse the National Federation of Federal Employees, Local 62, in an amount equal to the regular and periodic dues it would have received from the pay period beginning March 27, 1983 to June 25, 1983, but did not receive as a result of the unlawful delay in implementing the authorized request to increase the unit employees' basic dues allotments.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature) (Title)

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This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 688-3805.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and

Case No. 7-CA-30405

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed. Thereafter the General Counsel and the Charging Party filed exceptions and briefs.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, as modified herein.

In agreement with the Judge, the Authority concludes that the complaint which alleges a violation of section 7116(a)(1) and (5) of the Statute should be dismissed. The Authority concludes that the facts as found by the Judge do not establish that the Respondent had a duty to bargain concerning the change in established conditions of employment of unit employees at the Mid-American Program Service Center, Kansas City, Missouri (MAPSC). Thus, as found by the Judge, guidelines issued by the Respondent to its supervisors which, inter alia, concerned the rescheduling of lunch periods in connection with annual leave, merely restated a policy which had been established and was in effect since 1979 throughout Respondent's nationwide components and headquarters, with the sole exception of MAPSC. See United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois, 13 FLRA 636 (1984); Department of the

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Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA 240 (1981). These guidelines did not require MAPSC to change its local policy, established in 1979, concerning the rescheduling of lunch periods in conjunction with annual leave. Moreover, when MAPSC decided to change its policy in January 1983, to make it consistent with the national policy, it notified the Charging Party's local official, pursuant to the parties' negotiated agreement concerning proposed changes of working conditions which affect only one component, and the Union did not request to bargain concerning the proposed change. Under these circumstances, the Authority concludes that the Statute was not violated when the Respondent issued its guidelines to supervisors or when MAPSC implemented its proposed changes in the absence of a request to bargain by the Charging Party or its local.

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-30405 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. 7-CA-30405

Cathy A. Auble, Esq.
James J. Gonzales, Esq.
For the General Counsel

Mr. Reginald T. Huey
For the Charging Party

Carl J. Clayton, Esq.
Mr. Robert D. Pack
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, AFL-CIO (herein referred to as AFGE or the Union), on May 24, 1983 and amended on August 26, 1983, against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (herein referred to as Respondent), the General

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Counsel of the Authority, by the Regional Director for Region 7, issued a Complaint and Notice of Hearing on August 31, 1983, alleging that since on or about November 26, 1982, Respondent violated section 7116(a)(1) and (5) by unilaterally changing the terms and conditions of employment in one of its components by implementing a regulation entitled "Flextime PMS of 005", which implementation was first discovered by the Union during March 1983, without giving the Union notice or affording it the opportunity to bargain over the substance, impact and implementation of the charge.

Respondent's Answer substantially denied the allegations of the Complaint.

A hearing on the Complaint was conducted in Kansas City, Kansas, at which time all parties were represented and afforded full opportunity to adduce evidence,[1/] call, examine and cross-examine witnesses, and argue orally. Briefs were filed by respondent and Counsel for the General Counsel.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following findings of fact, conclusions of law, and recommendations:

Findings of Fact

There is no jurisdictional question herein.

The Mid-American Program Service Center, Kansas City, Missouri (herein called MAPSC or Kansas City Program Center) is a Social Security Program Service Center located in Kansas City.

The Union is the exclusive representative of a nationwide consolidated unit of Social Security Administration employees. As exclusive representative in a nationwide consolidated unit the AFGE delegated authority to negotiate on behalf of Respondent's employees to the AFGE General Committee of the Social Security Administration, (hereinafter called the General Committee.) The General Committee, is headed by Mr. Arthur Johnson, who has occupied the position since December 1979. In addition to heading the General Committee, and acting thereby as national spokesperson, Mr. Johnson also serves as President of American Federation of Government Employees, Local 1336 (herein called the local), the local exclusive representative involved herein. Mr. Johnson has been local union president since about 1964. More will be said about Mr. Johnson's local role later.

1/ The General Counsel's uncontested motion to correct the exhibits of the proceedings is granted.

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As national spokesperson, Mr. Johnson is the AFGE representative designated to receive notice from Respondent concerning any changes in conditions of employment, and to act as point of contact within AFGE over matters which the Respondent might wish to bring to AFGE's attention. Consistent with this role as national spokesperson and the previous practice between AFGE and the Respondent, Mr. Johnson would have in his national spokesperson role, received pre-implementation notice concerning matters such as the 1982 Flextime PMS regulation. The existing practice between the parties is that the Respondent, usually through its Director of Labor Relations Peter Spencer, would give written notice of matters to Mr. Johnson, addressing Mr. Johnson exclusively in his capacity as national spokesperson. According to Mr. Johnson, he has never delegated his authority or responsibility to receive notice on national matters from the Respondent to anyone. He has, however, delegated the authority to initiate bargaining, which he usually does in writing, but these delegations are limited to a particular issue. Further, Mr. Johnson would assign the issue to one of the members of the General Committee.

One of the component parts of the General Committee is the Payment Center Council, which represents employees in the various payment service centers. One of these Payment Service Centers, as already noted, is Respondent's Mid-America Program Service Center located in Kansas City, Missouri. As already noted, Mr. Johnson is the President of Local 1336, and as president Johnson is responsible for handling the day-to-day matters involving labor relations issues affecting employees at MAPSC. In this role, he is also responsible for receiving notice on behalf of the local from MAPSC where local matters are involved. When giving notice of changes in conditions of employment the practice between MAPSC and the local is that MAPSC usually gives written notice of local matters through its Director of Management to Mr. Johnson, addressed to Johnson in his capacity as President of the local. On the occasion in question, local notice was given orally originating from the Director of Management or one of the labor relations specialists. According to Mr. Johnson, he has never delegated the authority to receive notice on behalf of the local to anyone and only he has authority to initiate bargaining on behalf of the local. Such authority is in writing and usually delegated to an officer of the local such as the chief steward.

By letter dated January 11, 1983, MAPSC's Director of Management notified Mr. Johnson, as local president, that MAPSC intended to follow the 1982 regulation and attached a copy of the 1982 regulation to the letter. It is uncontroverted that Mr. Johnson, in his capacity as national spokesperson, never received notice of the implementation of the 1982 regulation. Mr. Johnson's first knowledge of the 1982 regulation, in any official capacity, was when he received the January 11, 1983 letter from MAPSC. Even though the only notice to Mr. Johnson came from MAPSC, MAPSC Labor Relations Specialist Robert Pack conceded that he had no

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delegated authority from Respondent to bargain over the substance of the 1982 regulation. The 1982 regulation, as previously noted had been implemented for approximately two months by the time Mr. Johnson received any notice.

The policy in question was first introduced around February 22, 1979. The Respondent established a policy for its employees located at its headquarters and program service centers allowing them to schedule a lunch period during the last two hours of a workday so long as such a "late lunch" was taken contiguously to a period of leave. The above policy was published in the SSA personnel Guide for supervisors on the above date and read as follows:

> Employees are not permitted to take their lunch break within 2 hours of the beginning or end of their 8-1/2 hour day unless the lunch is contiguous to a period of leave. —

A local policy, it must be noted, existed in the Kansas City office which was contrary to Respondent's national policy to restrict employees' components from taking their respective lunch periods during the first two and last two hours of their eight-hour workday unless such lunch period was scheduled in conjunction with a minimum of two hours of leave.

Sometime around November 26, 1982, Respondent issued and implemented in its Personnel Manual for Supervisors -- SSA called "Flextime PMS g005" which provided, in pertinent part, that:

> Employees are not permitted to take their lunch break within 2 hours of the beginning or end of their 8-1/2 hour day. So long as this rule is not violated, supervisors may arrange an employee's lunchtime to connect it to a period of leave.

The Flextime PMS g005 regulation was issued by Respondent, because it intended to reaffirm its policy of restricting certain employees from taking one half hour work periods during the first two and last two hours of their eight hour work day unless scheduled in conjunction with a minimum of two hours leave. Prior to the issuance of this regulation, Respondent's policy for its employees located at headquarters and in its program service centers, as previously noted, was that employees were able to schedule a lunch period during the last two hours of the workday so long as such a late lunch was taken contiguously to a period of leave.

Upon receiving the January 1983 memorandum, Mr. Johnson designated chief steward Mike Hughes to get an explanation or classification of what the cover letter meant from labor relations Specialist Bob Pack. Mr. Hughes returned to report the first of his conversations with Mr. Pack which was that under the 1979 policy an employee could take a

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lunch break in the last two hours of the day so long as it was connected with a period of leave; and under the new 1982 procedure they could not. Mr. Johnson's understanding was that under the 1979 procedure the supervisor had more discretion to give the leave than in the 1982 procedure.

Article A of the parties collective bargaining agreement provides instructions concerning the level at which pre-implementation notice of Respondent - initiated changes in condition of employment must be given. The 1982 regulations herein was distributed to three components within Respondent: headquarters, payment service centers, and data operations centers. Such distribution shows that the implementation of the 1982 regulation covered more than one component of the Respondent within the meaning of the parties collective bargaining agreement.

Article 4 of the parties collective bargaining agreement dealing with negotiations between the parties provides, as follows:

> Article 4
> NEGOTIATIONS DURING THE TERM OF THE AGREEMENT
>
> Section 1 - General
>
> The Administration will provide the Union reasonable advance notice prior to implementation of changes affecting conditions of employment subject to bargaining under 5 USC 71. Upon notice from the Administration of a proposed change, the designated union representative will notify the designated management representative of its desire to consult and/or negotiate on the change.
>
> The Union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible, and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasses Panel for resolution under its rules.
>
> Section 2 - National Level
>
> A. The parties agree that notice of proposed Administration-wide or intercomponent changes will be dealt with by the parties at the National level. For notification at the National level the Associate Commissioner, OMNBP, or the designate management representative will provide the Spokesperson, General Committee, or designated AFGE Local 1923 or Council representative with timely notice and seven copies of proposed management initiated changes.

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1. Negotiations over conditions of employment that impact on all six (6) components will be represented by the following negotiators and will be designated by the appropriate AFGE Council and Local 1923.

(a) Local 1923
(b) AFGE National Council of SSA Payment Centers
(c) AFGE National Council of SSA Field Operations
(d) AFGE National Council of SSA Office of Hearings and Appeals
(e) AFGE National Council of Data Operations Centers
(f) AFGE National Council of Field Assessment

2. Negotiations over conditions of employment that impact on less than six (6) but more than one (1) component shall be represented by one (1) negotiator designated by each affected component.

Section 3 - Component Level

The parties agree that notice of proposed changes which affect only one component (Field, Program Service Centers, Headquarters, Hearings and Appeals, Field Assessment Offices, Data Operation Centers) will be matters dealt with by the parties at the component level. The designated management representative will provide the designated union representative timely notice of proposed component-wide management initiated changes.

Negotiations over conditions of employment that impact on one (1) component shall be represented by at least two (2) negotiators (but not less than the number of management's negotiators) designated by the appropriate council president.

Section 4 - Regional/Program Service Centers/Data Operations Centers Changes

The parties agree that notice of proposed changes which affect only one Field Operations Region, Field Assessment Region, Hearings and Appeals Region, Program Service Center, and Data Operations Center, will be given to he Union and upon request negotiated at that level. The designated management representative with timely notice of proposed management initiated changes. Negotiations over conditions of employment that impact on the above entities will be represented by two (2) negotiators (but less than the number of management's negotiators) designated by the appropriate union official. [Emphasis added]

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A designated union representative representing the Union in negotiations under the terms of this agreement, who would otherwise be in duty status will be authorized official time and shall be entitled to reimbursement for travel and per diem expenses, as required by 5 USC 71. However, the Union may be represented by additional negotiators in a non-duty status.

Sections 5 - Modification of Time Frames

All time frames under this Article may be modified by mutual consent.

Inasmuch as three components were affected by the 1982 regulation, the Charging Party and General Counsel assert that Article 4, Section 2 above would apply, and therefore the national spokesperson should have been notified of the proposed change. The contract also provides that the only circumstances in which a local representative of AFGE is to receive notice of planned changes in working conditions is where the change is to affect only one installation. In addition, if Respondent were making a change by means of issuing a written announcement of same, and the change was to affect only one installation, the distribution code at the bottom of the announcement would specify the particular installation. In the case of a change that was to affect only MAPSC, the correct distribution code would be MAPSC, and would not specify SSA or that the change had come from Respondent.

As noted, since February 1979, MAPSC had a practice of allowing employees to schedule their respective lunch periods of thirty minutes in connection with a leave period of 15 minutes or more in such a manner as to allow employees to take a lunch period within the last two hours of their workday. This practice was not consistent with Respondent's 1979 policy. MAPSC enforced the 1982 regulation, effective March 8, 1983, and thereby stopped the practice of permitting employees to take their respective lunch periods during the last two hours of the workday and contiguously with a minimum period of leave of 15 minutes.

Indeed the collective bargaining agreement provides that all practices which were in effect on the effective date of the contract and which were not specifically covered by the contract were to continue as past practices and therefore could not be changed except in accordance with the

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Statute.[1/] The effective date of the contract is June 11, 1982. The past practice at issue existed from at least February 1979. The contract is silent on the matter of lunch breaks, as the parties decided during national negotiations on Article 31, "Time and Leave," to let past practices concerning lunch breaks to prevail.

Conclusions

The General Counsel asserts that Respondent changed a past practice which had been known to it for nearly three years, that it initially gave no notice and when notice was finally given, that notice was given at the wrong level. In addition the General Counsel claims that the flextime regulation herein was a negotiable subject.

Respondent argues that the issuance of PMS g005 was not a change in a condition of employment. If so, Respondent acknowledges an obligation to notify and negotiate at the national or consolidation level.

Case law dictates that in order to sustain the burden of proving a past practice it must be established not only that management knowingly, but consistently allowed or condoned the practice to continue. Polaris Missile Facility Atlantic, Charleston, South Carolina, 6 FLRA 372 (1981); Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 3 FLRA 655 (1981); Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA 240 (1981). Where management merely reaffirms a working condition there is no change in conditions of employment. Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736 (1980); Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA 240 (1981).

[1/] ARTICLE I

GOVERNING LAWS AND REGULATIONS

Section 2 - Past Practices

It is agreed and understood that any prior benefits and practices and understandings which were in effect on the effective date of this agreement at any level (national, council, regional and local), and which are not specifically covered by this agreement and do not detract from it shall not be changed except in accordance with 5 USC 71.

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This same case law places the burden of proof on the General Counsel to establish by a preponderance of the evidence that agency management knowingly and consistently acquiesced in the practice.

Applying these principles to the instant matter, it is clear that the General Counsel would have to prove, since this is a national regulation and all sides contend that notification and bargaining should come from the national level, that national management was aware of and condoned the "late lunch" policy practiced in the Kansas City Service Center before it could establish a past practice requiring negotiations prior to the change. It must be noted that the "late lunch" policy is not all that the name implies. The General Counsel relies, erroneously in my view, on the lack of negotiations over lunch periods. What is involved here is not a typical lunch period, but a leave policy. The two are distinguishable. In my view, the General Counsel failed to meet the burden of proof.

The record leaves no doubt that Flextime PMS g005 is a national regulation or guide.[2/] Consequently, bargaining on the "late lunch" policy, if required, would be at the national level. The General Counsel focused on exceptions to the national policy at the Kansas City Service Center where for several years Respondent's local supervision has indeed allowed exceptions to the national policy. He ignores the fact that most other components had applied the late lunch policy in a fashion consistent with what Respondent sought to obtain here. While the General Counsel established that local supervision allowed such exceptions it did not establish when or under what circumstances national management became aware of the local exceptions or that national management ever acquiesced in the local policy. In fact, since most other components applied the policy in a fashion consistent with the 1982 change it would not be unreasonable to assume that Respondent was unaware of the different interpretation of Kansas City supervisors until shortly before the regulation or guide was issued. Similarly, the record suggests that national management never acquiesced in any local manager's interpretation of the February 1979 regulation which was inconsistent with the national policy.

Since the policy was established at the national level and there apparently was no authority at the Service Center level to change that policy, it is difficult to see how local exceptions to the national policy could ripen into an established past practice at a level where there is no obligation to bargain. It is my opinion that the policy could have matured into a condition of employment only if, at the national level, Respondent had knowledge of and acquiesced in the local exception. Thus, exceptions granted by local supervisors, when they had no authority to do so, could hardly be considered as acquiescence by Respondent at the

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2/ If it is a guide for supervisors, and such is not clear on the record, there may well be no obligation to bargain, since Respondent would merely be informing its supervisors how to apply the regulation. Based on the findings herein, I deem it unnecessary to decide that issue.

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national level. Respondent's regulation of November 1982 made it clear that it did not condone local supervisors actions regarding a "late lunch" policy inconsistent with its interpretation of that policy and the 1982 regulation clearly affirmed its dissatisfaction. In my opinion, Respondent's November 1982 regulation was a reaffirmation of an existing policy and not a change in conditions of employment at the Kansas City Service Center.

Finally, the General Counsel suggests that Respondent acquiesced in the Kansas City Service Center's application of the regulation, or that Respondent had knowledge of and allowed the practice at the Kansas City Service Center to continue. Again, the record discloses that Respondent's written and unwritten policy was always not to allow employees to take their lunch periods during the last two hours of the day unless in connection with two hours leave. Respondent's latest regulation shows no change in that position, but was merely an attempt in writing to bring all of the Service Centers under the same regulation. Clearly a reaffirmation of what it interpreted the policy to be and contrary to the General Counsel's contention that it allowed the "late lunch" practice to continue.

Since it is my conclusion that the General Counsel did not establish by a preponderance of the evidence that Respondent changed a condition of employment, I therefore, deem it unnecessary to decide whether notification was given to a proper union official.

In light of all the foregoing, it is found that Respondent did not violate section 7116(a)(1) and (5) of the Statute by unilaterally changing the terms and conditions of employment by implementing a regulation entitled "Flextime PMS of 005" without providing prior notice to the Union and affording it an opportunity to bargain over the substance, impact and implementation of the change.[3/] Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

It is hereby ordered that the complaint in Case No. 7-CA-30405, be and, it hereby is, dismissed in its entirety.

Eli Nash Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: September 27, 1984
Washington, D.C.

3/ In addition the General Counsel raised issues concerning negotiability and waiver in this matter. In view of the above disposition, I view it as unnecessary to address those issues.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
FEDERAL PRISON SYSTEM
FEDERAL CORRECTIONAL INSTITUTION
MILAN, MICHIGAN

Respondent

and

Case Nos. 5-CA-30090
5-CA-30098
5-CA-30202
5-CA-30205

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1741, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled consolidated proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of the complaint with respect to them. Thereafter, the Charging Party filed exceptions to the Judge's Decision,[1/] and the

1/ The Charging Party excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

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Respondent filed an opposition to the Charging Party's exceptions and a motion to strike certain documents appended to the Charging Party's exceptions.2/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U. S. Department of Justice, Federal Prison System, Federal Correctional Institution, Milan, Michigan shall:

1. Cease and desist from:

(a) Removing documents from bulletin boards of the American Federation of Government Employees, Local 1741, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at the Milan facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

2/ Certain of these documents were contained in the record while others were not. In reaching its decision in the instant case, the Authority has only considered facts contained in the record, and therefore the motion to strike is denied. See Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115 (1982).

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(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the other allegations of the consolidated complaint be, and they hereby are, dismissed.

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT remove documents from the bulletin boards of the American Federation of Government Employees, Local 1741, AFL-CIO.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: Suite 1359-A, 175 Jackson Boulevard, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6306.

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE ADMINISTRATIVE LAW JUDGE
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF JUSTICE FEDERAL PRISON SYSTEM FEDERAL CORRECTIONAL INSTITUTION MILAN, MICHIGAN Respondent	
and	Case Nos. 5-CA-30090 5-CA-30098 5-CA-30202 5-CA-30205
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1741, AFL-CIO Charging Party	

Robert M. Wilansky
For the Respondent

Claire R. Morrison, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

On December 6, 1982 American Federation of Government Employees, Local 1741, AFL-CIO (hereinafter called AFGE Local 1741 and the Union) filed an unfair labor practice charge in Case No. 5-CA-30090 alleging that U.S. Department of Justice, Federal Prison System, Federal Correctional Institution, Milan, Michigan (hereinafter call FCI-Milan and Respondent)

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violated Sections 7116(a)(1), (2), (3), (4), (5) and (8) of the Statute when it took various actions against Union steward Carl Sanders.

On December 13, 1982 the Union filed a charge in Case No. 5-CA-30098 alleging that Respondent violated Sections 7116(a)(1), (2), (3), (4) and (8) of the Statute when it took certain actions against AFGE Local 1741 President Hebert Betts.

On February 2, 1983 the Union filed amended charges in Case Nos. 5-CA-30090 and 5-CA030098. On February 4, 1983 General Counsel of the FLRA, by the Director of Region 5, issued an Order Consolidating Cases, Complaint and Notice of Hearing in Case Nos. 5-CA-30090 and 5-CA-30098 alleging that Respondent violated Sections 7116(a)(1), (2), (4) and (8) of the Statute.

On February 24, 1983 the Union filed a charge in Case No. 5-CA-30202 alleging that Respondent violated Sections 7116(a)(1), (2), (3), (4) and (5) of the Statute by removing certain Union material from a bulletin board.

On February 25, 1983 the Union filed a charge in Case No. 5-CA-30205 against Respondent alleging that it violated Sections 7116(a)(1), (2) and (4) of the Statute in connection with additional actions taken against Sanders.

On March 28, 1983 the General Counsel of the FLRA, by the Director of Region 5, issued a Complaint and Notice of Hearing in Case No. 5-CA-30202 alleging that Respondent had violated Section 7116(a)(1) of the Statute. On March 28, 1983 the Director of Region 5 of the FLRA issued an Order Further Consolidating Cases in Case Nos. 5-CA-30090, 5-CA-30098 and 5-CA-30202.

On March 30, 1983 the General Counsel of the FLRA, by the Director of Region 5, issued a Complaint and Notice of Hearing in Case No. 5-CA-30205 alleging that Respondent violated Sections 7116(a)(1), (2) and (4) of the Statute. On March 30, 1983 an Order Further Consolidating Cases was issued with respect to Case Nos. 5-CA-30090, 5-CA-30098, 5-CA-30202 and 5-CA-30205.

Respondent filed timely Anwsers denying that it had violated the Statute as set forth in the above discribed Complaints.

A hearing was conducted before the undersigned in Detroit, Michigan. All parties were given an opportunity to be represented and Respondent and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs have been filed and have been fully considered.

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Base upon the entire record in this matter, my observation of witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Finding of Fact

At all times material herein American Federation of Government Employees (AFGE), Council of Prison Locals was the collective bargaining representative for a nationwide unit of employees of the Federal Prison System. AFGE and Respondent were parties to a collective bargaining agreement. AFGE Local 1741 was the collective bargaining representative for those unit employees located at the Milan Correctional Institution.

Case No. 5-CA-30202

During March 1982 AFGE Local 1741 and FCI-Milan agreed, as permitted in the collective bargaining agreement, that the Union would be permitted to share the bulletin board located in the Milan Institution's front lobby (hereinafter called the lobby bulletin board). Within a few days the Union began to use the left side of this lobby bulletin board posting notices which encouraged Union-membership, and notified employees of Union meetings and other Union-related activities.

Prior to February 4, 1983 Union material had not been removed from the Union's portion of the lobby bulletin board except by AFGE Local 1741 officials. During July 1982 Warden J.R. Johnson and AFGE Local 1741 President Betts agreed that the Union would sign all material it posted on the lobby bulletin board. This was agreed to because Respondent wished to insure that the employees would be able to distinguish between material posted by the Union and that posted by FCI-Milan.

During the morning of February 4, 1983 Warden Johnson instructed his secretary, Arlene Spears, to remove any out dated material from the lobby bulletin board. The lobby bulletin board was not neat, some papers had fallen down, and it had out dated material on it. Warden Johnson did not specifically instruct Spears to remove Union material. Spears removed notices from all portions of the lobby bulletin board. Spears removed not only memoranda posted by Respondent but items posted by the Union, including a brightly lettered bumper sticker that stated "Join AFGE," a notice of available discounts for Union members at Disney World, and a golf tournament announcement.[1/] None of these documents were specifically signed by the Union officials. Spears was unaware of the arrangement permitting the Union to use one half of the lobby bulletin board.

1/ Although some of the items might have been out dated, neither the Disneyland Announcement nor the AFGE bumper sticker were outdated.

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On February 4, 1984 Betts was advised that the Union's material had been removed from the lobby bulletin board. Betts then observed that the lobby bulletin board no longer had any Union material posted.

Betts went to see Spears and asked her who took the Union material down from the lobby bulletin board. Spears replied that she had done it because she had been asked by the Warden to clean up the bulletin board and to remove out dated material. Spears further indicated the Union material had been thrown in the waste paper basket.[2/] Betts indicated he might file a grievance.

Case Nos. 5-CA-30090, 5-CA-30205

In March, 1982, Warden Johnson, was informed by memorandum of the names of Union's officers, stewards and committee members. Betts was listed as the Union's President and Carlan Sanders was listed as a steward for the wage grade bargaining unit employees.

As Union President, Betts engaged in activities on behalf of the Union, including representing bargaining unit employees in such matters as job changes, hours being changed without notice, grievances and disciplinary actions. Betts represented employees in various matters before Warden Johnson on two or three occasions. He also represented employees, including Carlan Sanders, in mid-November, 1982 before J.T. Wahl, the Institution's Food Service Administrator.

After Sanders became a steward, he represented employees within Milan Institution's Food Service. Some of this activity brought him into contact with Wahl and Cline, Assistant Food Service Administrator. On one occasion, at Sanders' request, Wahl began xeroxing and distributing work assignments, instead of placing them on a bulletin board.

On or about September 1, 1982, Carlan Sanders, in his capacity as steward, represented a Food Service bargaining unit employee, Peterson, before Wahl concerning two memoranda which Peterson had allegedly written. Sanders was relatively quiet during this meeting.

[2/] Betts testified that Spears had stated that she had destroyed the Union material. Spears testified that she had stated that the Union material had been thrown in the waste paper basket. In this regard, I credit Spears' version because she was generally a more credible witness whose testimony was, in many respects corroborated by other witnesses. Further her statement, could easily have been understood as meaning the Union material had been destroyed.

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Prior to September, 1982 Sanders had not received any counseling memoranda regarding his performance. In addition, in March 1982, he had received an "outstanding" annual performance appraisal from Cline and Wahl which recommended that Sanders be considered for a managmeent position within the Institution.

Prior to September 2, 1982, Sanders had never been counseled with regard to sick leave. He had not been put on any kind of sick leave restriction. Cline reqested a sick leave note from Sanders during September 1982. Cline requested the doctor's note because he believed Sanders had too many sick leave days taken in conjunction with Sanders' regular days off. Sanders told Cline that a request for a doctor's slip must first be made in writing, according to the provisions of the master agreement.3/ After checking the master agreement, Cline concluded Sanders was correct and withdrew his request for a sick leave note.

On September 13, 1982, Sanders received three memoranda from Cline. One of the memoranda concerned Mr. Sanders' use of sick leave, but did not impose any restrictions. The other two memoranda concerned unsatisfactory performance. Sanders on his own brought the doctor's slip in to Wahl and CLine explaining sick leave absences.

On September 22, 1982, Sanders received from Warden Johnson, through Mr. Wahl, a memorandum which required that Sanders undergo a fitness for duty examination because Sanders had been taking a great deal of sick leave. Subsequently, Sanders underwent such an examination and, after continual requests, Sanders on December 21, 1982 provided a statement from his personal physician who had done the examination. One of the other

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3/ Article 20, Section b provides:

Section b. Employees will normally not be required to furnish a medical slip to substantiate sick leave for three (3) consecutive working days or less, except in individual cases where certification may be required for sick leave of any length in accordance with regulations.

In questionable cases such as repetitive taking of sick leave immediately before or after holidays, vacation and/or days off, the Employer may require medical certification for sick leave of any length. However, the employee must first be informed orally of his/her questionable sick leave record. If this advice does not bring improvement in the employee's sick leave record he/she will be notified, in writing, that all future absences because of sickness must be substantiated by medical certificate. This requirement shall be reviewed every six months to determine the necessity for continuing this requirement.

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memoranda that Sanders received on September 13, 1982 concerned Sanders' unsatisfactorily cleaning up a sugar spill in the kitchen after Sanders had been specifically instructed to clean up the spill. The final memorandum concerned Sanders' failure to follow security procedures with respect to his accountability for inmates under Sanders' control. Sanders submitted responses to these three memoranda in which he tried to explain and justify his conduct.

On October 27, 1982, Sanders received from Mr. Wahl a letter dated October 26, 1982 which proposed that he be suspended for five days in connection with an inmate allegedly having been released from his work location without a pass. Mr. Sanders replied to this proposed suspension on November 1, 1982. Wahl proposed the action because, from his warehouse vantage point, Wahl saw Sanders release an inmate from the dining room. The inmate was released by Sanders without a pass and the inmate created a disturbance in a dormitory. When Wahl confronted Sanders about the inmate's location, Sanders told Wahl that the inmate must have "snuck out" the back door. Wahl counseled Sanders concerning the release of the inmate from the dining room without a pass. Sanders' response to the counseling was that the inmate had snuck out the back door. The proposal was written because Sanders had lost the accountability of the inmate for a second time in thirty days. Cook foremen are supposed to know at all times the whereabouts of the inmates under their supervision.

By letter dated November 16, 1982 Warden Johnson reduced the proposed five-day suspension to a three-day suspension. The three day suspension was for purposes of rehabilitation. Even if Sanders had been telling the truth when he denied that the inmate was intentionally released, Sanders was still held responsible because the accountability of inmates is one of the most critical responsibilities for any correctional worker. Sanders served the suspension between November 27 and 30, 1982.

On November 7, 1982, a Sunday, Sanders was on duty as cook foreman, which meant he had responsibility, among other things, to serve brunch from a preplanned menu. The menu provided that the brunch was to include eggs fried to order, hash brown potatoes and toast. Cline was on duty because it was his regular workday. Associate Warden Laird complained to Cline that at brunch, hashed boiled potatoes were being served instead of hash brown potatoes, and that the inmate cooks were cooking eggs to order for their friends, while other eggs had been pre-cooked and were served cold. Sanders advised Cline at 11:40 a.m.[4/], that the bread slicer was broken and Sanders didn't know if there would be sufficient toast. Almost immediately Sanders ran out of toast. Cline ordered steps to be taken to repair the slicing machine and to hand slice bread to make toast.

[4/] Brunch had started at 11:15 a.m.

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On November 9, 1982, Wahl wrote a request to the personnel office for assistance in presenting a disciplinary action proposal against Sanders concerning the performance of his duties at the November 7, 1982 brunch.

On November 23, 1982, Mr. Betts, in his capacity as Union President, served a copy of a charge in what later became Case No. 5-CA-30090, upon Warden Johnson, Mr. Wahl, and Mr. Cline. A key figure discussed in the basis of the charge was Carlan Sanders. This charge was subsequently filed with Region 5 of the Federal Labor Relations Authority.

On December 4, 1982, Mr. Sanders received a proposed seven-day suspension. This proposed suspension letter, dated November 29, 1982, concerned the above described brunch served on November 7, 1982. Sanders filed a response to the proposed suspension with Warden Johnson.

On November 30, 1982, Sanders received from Warden Johnson, through Wahl, a memo which required Mr. Sanders to pay for long distance personal calls he had made from the institution to his home. Sanders' reply to this memo indicated he had not made any of the calls for which he was being charged. This matter was pursued no further.

Warden Johnson, by letter dated December 22, 1982, advised Sanders that in agreement with the December 4, 1982 recommendation, Sanders was being suspended for seven days because of Sanders failure to properly perform his duties in preparing the Sunday brunch meal. Sanders served this suspension from December 28 to January 6, 1983.

On December 19, 1982, Cline needed a cook foreman to work overtime because Larry Sanders had left the institution without permission. Cook foreman Peterson was sick, cook foreman Sims was on vacation and cook foreman Rucker was scheduled to work a later shift. Cline asked cook foreman Fortonour to work overtime, but Fortonour stated that he had worked overtime the week previously. Cline then asked Carlan Sanders, who, stated he could not work overtime because of his health. Sanders told Cline of a doctor's slip in the medical file. Cline spoke to Correctional Supervisor Litz and Duty Officer Gatchel about the situation. Gatchel called the physician assistant to check on Sanders' claim. No such doctor's slip was found in the medical record. Cline told Sanders that he (Sanders) could go home and get his medicine, but Sanders refused to drive twenty miles to get his medicine. Correctional Supervisor Litz told Sanders he could get the medicine from the institution hospital, but Sanders went to work without trying to obtain the medication.

On December 22, 1982, Wahl assigned Sanders to the dish room. This assignment to the dish room began on December 23, 1982 and continued again on January 3 to January 11, 1983. The dish room was very hot. The temperature of the dish machine's rinse water was 210 degrees. Sanders stood in the open doorway during his shift. The dish room windows were

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closed but the doors were open. Several factors led to Sanders' assignment to the dish room. One factor was Sanders' job performance and Sanders'frequent use of sick leave. Wahl was unable to determine whether or not, on a daily basis, Sanders would be at the institution. Further, the inmates had caused a recent food strike and full time coverage was necessary to help with the situation in case of another food strike. A full-time correctional officer was assigned to supervise the inmates and the cleaning of the dining room. Sanders was assigned to the dish room to supervise only those particular inmates. If Sanders did not report to work, the correctional officer could take over the dish room duties as well. Sanders could sit down in the dish room if necessary and it was a smaller area to supervise.

When Sanders returned to work on January 7, after having served his suspension Cline gave him a letter in which it was proposed that Sanders be suspended for a period of ten days. The proposed suspension concerned Mr. Sanders' allegedly having lied to his supervisor.

On December 23, 1982, Sanders had told Wahl that Dr. Barth, a doctor at the institution, stated that his (Sanders') blood pressure was extremely high and that Sanders should go home immediately. Based on Sanders' representations, Wahl released Sanders on sick leave. Wahl told Sanders to report to the Correctional Supervisor's office where he (Sanders) repeated before other employees what Dr. Barth had supposedly told him. Following this conversation with Sanders, Wahl spoke to Dr. Barth who informed Wahl that he did not give Sanders instructions to leave. Dr. Barth's instructions were that Sanders' blood pressure was moderately elevated and that the condition should not cause Sanders immediate concern and that Sanders had to decide if he felt to ill to work and, if he did, he should take sick leave.

Wahl testified that he gave Cline the authority to sign the suspension proposal on Wahl's behalf because he was not present to issue it. Wahl proposed the ten day suspension against Sanders because Sanders had lied concerning Dr. Barth's statement. Sanders had lied not only to Wahl but also to several others. Wahl recommended the suspension because the Food Service Department could not fulfill its mission if the supervisors cannot depend on the staff to tell the truth. The ten day penalty was proposed because this was Sanders' second offense of lying to Wahl, and Sanders' third offense.

On January 12, 1983, Sanders replied to the proposed suspension. On January 13, 1983, Sanders gave an affidavit in Case No. 5-CA-30090 to an FLRA investigator. An extended interview took place in the Warden's Conference Room. Sanders' interview was interrupted once when Warden Johnson came into the room and twice by James Austin, the Personnel Chief. These interruptions occurred because Warden Johnson and Austin were unaware the room was still in use and on one occasion they wished to tell the FLRA agent to lock up the room when finished.

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On January 20, 1983, Sanders received a letter, dated Janury 17, 1983 from Warden Johnson with regard to the proposed ten day suspension. Sanders was suspended for the full ten days. Sanders served the suspension between January 25 and February 3, 1983.

The Warden upheld the ten day penalty against Sanders because Sanders had previously been charged with the same offense, and the desired corrective action of the former penalty did not accomplish its goal. Sanders' Union activities had nothing to do with the decision.

Case No. 5-CA-30098

On December 1, 1982, Betts was ordered out of the rear gate house, his work assignment, while Warden Johnson inspected it. Warden Johnson found a radio playing and a magazine in the gate house. On December 2, 1982, Mr. Betts received a telephone call from the Institution's Chief Correctional Supervisor, Harold Killyon. Mr. Killyon questioned Mr. Betts about plastic jugs going out the rear gate where Mr. Betts worked. Mr. Killyon also asked Mr. Betts if he had seen any meat go out of the rear gate. Mr. Killyon specifically inquired as to whether Mr. Betts had seen anything go out of the rear gate from the boiler room.

Warden Johnson was notified on December 1, 1982 that Betts had large plactic detergent jugs in his car and had removed jugs from the institution's grounds. On December 1, 1982 Warden Johnson learned that "wet-type" garbage including meat had been improperly disposed of in the dumpster.

On December 2, 1982, Warden Johnson entered the rear gate area. Warden Johnson entered Betts' office, and then, with Betts, went to Betts' personal vehicle which was parked by the gate. Warden Johnson looked in Betts' car and asked Betts about presence of a plastic jug in the vehicle. After Betts had explained about the empty plastic jug, Warden Johnson questioned Betts about a brown paper bag which was on the back seat of his car. Betts refused to respond to the question asked. Warden Johnson ordered Betts to tell him (Warden Johnson) what was in the package. Betts refused. Warden Johnson ordered Betts to take Betts' car to the front of the institution and report to the personnel office. Correctional Supervisor Clendening repeated the instructions to Betts. Betts refused to follow these instructions and began walking and following the Warden towards the front of the institution. As Betts walked through the compound, he loudly made remarks that he was "being fired for a couple of barrels" and other remarks about being fired. Warden Johnson ordered Betts again, three separate times, while in the "A" corridor of the institution to move his car around to the front of the institution. Betts refused all three times.

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Austin discussed with Warden Johnson sending Betts home on administrative leave because Betts was a threat and an embarrassment. Betts was relieved and placed on administrative leave while the matter which had transpired was investigated. Betts was told that he was being placed on administrative leave by Austin and Killyon and was told to leave the institution. Austin, Killyon and Betts returned to Betts car and they inspected the brown package, which contained personal belongings of Betts.

After Betts' car was searched by Austin and Killyon, Betts was ordered by Austin to stay at home between 7:30 a.m. - 4:00 p.m. On the administrative leave, an employee is on-duty, but at home.

Credibility Resolutions

In setting forth the foregoing statement of facts, I discredited the testimony of Betts and Sanders. Their testimony was confusing and inconsistant with prior statements, documents and records. I found other witnesses more credible than Betts and Sanders. The testimony of the other witnesses was more precise and more consistant with the surrounding circumstances and the written records made counterproposals with the events in question than was the testimony of Betts and Sanders. Specifically I discredit Betts' contention that on December 2, 1982 he requested Union representation and Sanders' contention that Wahl made statements to Sanders concerning Wahl "playing games" and punishing Sanders because of Sanders' Union activity.

Discussion and Conclusions of Law

Case No. 5-CA-30202

In determining whether Respondent violated Section 7116(a)(1) of the Statute by removing the Union documents from the bulletin board, it must be determined whether the conduct would foreseeably have the tendency to discourage Union activity and support. See, U.S. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA 724 (1980).

In the subject case Respondent had agreed to permit the Union to utilize one half of the lobby bulletin board for Union notices. There is no evidence that Respondent reserved the right to remove any Union notices from the bulletin board.[5/] Further, the facts that the person who removed the notices was unaware of the agreement permitting the Union to use the bulletin board and that she did not intend to interfere with Union activity, are irrelevant.

5/ Although the Union agreed to sign all notices, the record establishes that the removed notices all indicated that they were Union notices and hence were in substantial compliance with this requirement.

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Respondent's unilateral action in removing the Union's notices from the lobby bulletin board, after Respondent had agreed to permit the Union to use the bulletin board, was a raw display of power which, it is concluded, would foreseeably have the effect of interferring with employees' desiring to exercise their rights to engage in activity on behalf of the Union. Thus, it is concluded, Respondent violated Section 7116(a)(1) of the Statute.

Case Nos. 5-CA-30090, 5-CA-30098 and 5-CA-30205

The facts in these cases fail to establish that either Sanders or Betts were treated discriminatorily or in any way punished because of their activities on behalf of the Union or because they engage in filing charges with or giving statements to the FLRA. The record fails to establish any anti-union animus on the part of Respondent. Thus, although Betts and Sanders were active on behalf of the Union and did file unfair labor practice charges with and gave statements to the FLRA, they were suspended and otherwise treated the way they were, because Responent perceived them as performing their work assignments poorly and because they did not obey orders.

The credible evidence in this case fails to establish any nexus between Betts' and Sanders' Union activity or other proctected activity and their treatment by Respondent. The mere fact that an employee engages in Union and other protected activity does not insulate that employee from discipline for poor job performance or other misconduct. There must be a causal relationship between the protected activity and the disciplinary action. See, Community Services Administration, 6 FLRA 616 (1981) and Department of Transportation, Federal Aviation Administration, 11 FLRA 67 (1983).

The credible evidence in these cases fails to establish that Sanders and Betts were disciplined or otherwise treated discriminatorily because they had engaged in Union or other protected activity. Accordingly, I conclude that Respondent did not violate Sections 7116(a)(1), (2), (4) and (8) of the Statute with respect to Case Nos. 5-CA-30090, 5-CA-30098 and 5-CA-30205.

Having concluded that Respondent violated Section 7116(a)(1) of the Statute with respect to the removal of the material from the bulletin board, but did not violate Sections 7116(a)(1), (2), (4) and (8) of the Statute with respect to the treatment of Betts and Sanders, it is recommended that the Authority adopt the following order:

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the

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U.S. Department of Justice, Federal Prison Systems, Federal Correctional Institution, Milan shall:

1. Cease and desist from:

(a) Removing documents from bulletin boards of American Federation of Government Employees, Local 1741, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative action to effectuate the purposes and policies of the Statute:

(a) Post at the Milan facility copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a responsilbe official of the Milan facility and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by the Federal Prison System to insure that such notices are not altered, defaced, or covered by ny other material.

(b) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 5, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply with the Order.

It is further Ordered that the Compliant in Case Nos. 5-CA-30090, 5-CA-30098 and 5-CA-30205 be and the same hereby are, dismissed.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: May 8, 1984
Washington, D.C.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT remove documents from the bulletin boards of American Federation of Government Employees, Local 1741, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

_____
(Agency or Activity)

Date: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice, or compliance with its provisions, they may communicate directly with the Regional Director, Region 5, Federal Labor Relations Authority, whose address is: 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, and whose telephone number is: (312) 886-3468.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

TENNESSEE NATIONAL GUARD

Respondent

and

Case No. 4-CA-20148

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-108

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the National Association of Government Employees, Local R5-108 (NAGE) filed exceptions to the Judge's Decision and the Respondent filed an opposition to NAGE's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order. See Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA No. 65 (1984), aff'd sub nom. New York Council, Association of Civilian Technicians v. FLRA, No. 84-4128 (2d Cir. Mar. 14, 1985).

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-20148 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGE
WASHINGTON, D.C. 20424

TENNESSEE NATIONAL GUARD Respondent	
and	Case No. 4-CA-20148
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-108 Charging Party	

Dan R. Bradley, Esquire
Les Barham, Esquire
For the Respondent

Paul J. Hodnett, Esquire
For the Charging Party

Linda J. Norwood, Esquire
For the General Counsel

Before: WILLIAM DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1/] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns a conceded refusal to comply with a

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(6) will be referred to, simply, as "§ 16(a)(6)."

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final order of the Federal Service Impasses Panel which involved the attire to be worn by National Guard technicians when performing civilian technician duties. This matter was initiated by a charge filed on January 11, 1982 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued on November 18, 1982 (G.C. Exh. 1(b)); by Order dated April 24, 1984, following various motions, hearing was scheduled for May 24, 1984, pursuant to which a hearing was duly held on May 24, 1984, in Nashville, Tennessee, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues; and were afforded the opportunity to present oral argument which each party waived. At the close of the hearing, June 25, 1984, was fixed as the date for mailing post hearing briefs. Respondent, the Charging Party and General Counsel each timely mailed an excellent brief, received on, or before, June 28, 1984. On August 20, 1984, this Office received Counsel for General Counsel's Motion for Remand which requested that, ". . . this case be remanded to the Regional Director for Region IV for further appropriate action consistent with the Authority's decision [Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA No. 65, 15 FLRA 288 (1984)]. As the matter is ripe for decision, General Counsel's Motion for Remand is hereby denied.

Discussion and Conclusions

By letter dated July 29, 1981, Respondent advised the Federal Service Imparses Panel (FSIP) that as to the uniform issue, its position, inter alia, was that,

> ". . . the Adjutant General has determined that the uniforms issued to each member will be the work uniform for all military technicians." (G.C. Exh. 5).

On October 5, 1981, the FSIP issued its Decision and Order, Case No. 81-FSIP-91 (G.C. Exh. 6), in which, after noting Respondent's position, set forth, in part, above, it ordered, inter alia, that the parties adopt language in their agreement,

> ". . . affording individual employees, while performing their day-to-day technician duties, the daily option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without display of military rank, such clothing to be obtained by employees who choose to wear it . . ." (G.C. Exh. 6).

By letter dated October 16, 1981, Respondent notified the FSIP that,

> "1. In regard to Case No. 81 FSIP 91 . . . the State of Tennessee will be in non-compliance with the order.

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"2. We do not feel that the day-to-day option is in compliance with law or regulation." (G.C. Exh. 7).

The record is clear that Respondent unequivocally asserted the exercise of a management right, i.e., ". . . the Adjutant General has determined that the uniforms issued . . . will be the work uniform for all military technicians", and informed the FSIP that it would not comply with its order because," we do not feel that the day-to-day option is in compliance with law or regulation"; but it is equally clear that Respondent did not specifically assert that the Union's proposal was non-negotiable. Nevertheless, the FSIP, despite Respondent's assertion of a management right, acted on an issue that required, as a condition precedent, determination of negotiability. At the hearing, and in her brief (General Counsel Brief, p. 9 n. 7), counsel for General Counsel conceded that, ". . . if the Panel acts on an issue that is non-negotiable -- whether it has been determined or not -- and orders the parties to adopt non-negotiable items in their contract, it acts without authority." (Tr. 39), but asserted at the hearing, and in her brief (supra), that, ". . . had the Panel acted without a negotiability determination on the issue of uniforms, it may have acted without authority" but ". . . as far back as 1981, the Authority held, in upholding a Counsel's older Decision, the Authority specifically held that the uniform issue was negotiable. That case is Nevada National Guard, 7 FLRA 245, 1981." (Tr. 18).2/

Respondent's assertion of its exercise of a management right in determining that the uniforms issued would be the work uniform for all military technicians necessarily required that the FSIP, by ordering the adoption of contrary language, determined the negotiability of that issue, whether it did so, which would have been beyond its authority, or whether it, by silence, relied upon the prior determination of negotiability, either by the Authority or by the Council, which General Counsel asserts the FSIP did in this case; the issue of negotiability is jurisdictional, was not waived by Respondent, and property was raised in response to the unfair labor practice complaint.

2/ In point of fact, the FSIP could not have relied upon the Authority's decision in Nevada National Guard, supra, as that decision issued more than a month (November 19, 1981) after the FSIP's Decision and Order in this case (October 5, 1981). Although I am aware of Council determinations of negotiability of the uniform issue prior to October 5, 1981, see, for example, Kentucky National Guard, 4 FLRA No. 73, 4 FLRA 534 (1980), I am not aware of an Authority determination of the negotiability of the uniform issue prior to its Nevada National Guard, supra, decision.

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Subsequent to the hearing and the submission of briefs, the Authority in a series of decisions has removed wholly the underpinnings of General Counsel's negotiability determination argument. First, in Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA No. 65, 15 FLRA 288 (July 17, 1984) and thereafter in Military Department, State of Oregon, Oregon Army and Air National Guard, Salem, Oregon, 15 FLRA No. 100 (August 9, 1984; State of Nevada National Guard, 15 FLRA No. 101 (August 9, 1984)(this decision, on remand, reversed the Authority's prior decision, 7 FLRA 265 (1981), supra, principally relied upon by General Counsel); State of California National Guard, 15 FLRA No. 102 (August 9, 1984); Puerto Rico Air National Guard, 15 FLRA No. 103 (August 9, 1984; National Guard Bureau, Maine Air National Guard (Augusta, Maine), 15 FLRA No. 104 (August 9, 1984), the Authority held,

> ". . . the determination by the National Guard Bureau that technicians must wear the military uniform while performing technician duties constitutes management's choice of a 'methods, and means of performing work' within the meaning of section 7106(b)(1) of the Statute. For the reason expressed in State of New York the Authority finds that the failure of the Respondent to cooperate in the final decision and order of the Panel did not constitute a violation of section 7116(a)(1) and (6) of the Statute." State of Nevada National Guard, 15 FLRA No. 101 at p. 2.

In like manner, the determination of the Adjutant General of Tennessee that technicians must wear the military uniform while performing technician duties constitutes management's choice of a "methods, and means of performing work" within the meaning of § 6(b)(1) of the Statute. Accordingly, for the reasons stated by the Authority in the foregoing cases, Respondent's failure to cooperate in the final decision of the Panel did not constitute a violation of §§ 16(a)(6) or (1) of the Statute and it recommended that the Authority adopt the following:

ORDER

The complaint in Case No. 4-CA-20148 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 13, 1984
Washington, D.C.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT

Respondent

and

Case No. 3-CA-20005

NATIONAL TREASURY EMPLOYEES
UNION AND CHAPTER 190

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the stipulation of facts, accompanying exhibits, and the parties' contentions,[1/] the Authority finds:

The complaint alleges that the Department of the Treasury, Bureau of the Public Debt (the Respondent) violated section 7116(a)(1) and (8) of the Statute[2/] by failing to grant the Union's request for official

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1/ The Respondent's brief was untimely filed and therefore was not considered by the Authority.

2/ Section 7116(a)(1) and (8) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

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time under section 7131(a)[3/] to its unit employees, for the time they spent in travel related to contract negotiations while they were representing the National Treasury Employees Union and Chapter 190 (the Union). The Respondent stipulates that it denied official time for such travel incident to the negotiations. In addition to the issue of entitlement to official time under section 7131(a) for travel incident to representing an exclusive representative in negotiations, this case also raises a question as to how many union representatives would be entitled to official time for such travel.

The Union is the exclusive representative of a unit of approximately 1,600 employees, approximately 700 of whom are located in Washington, D.C. and approximately 900 of whom work in Parkersburg, West Virginia. Chapter 190 represents the Parkersburg, West Virginia employees. On July 28, 1980 the parties agreed on ground rules for master contract negotiations to be held in Washington, D.C. with each negotiating team being composed of a chief negotiator and five other members, one of whom would be an alternate. Two members of the Respondent's team worked in Parkersburg. On April 23, 1981 the Union requested official time for four unit employees, Wanda Wiseman, Susan Wiggins, Dianna Meredith and Ed Bloomer, who worked in Parkersburg, for April 27, when they would travel to Washington for negotiations to be held the following day. The Respondent refused the request and these four employees took annual leave for the travel that day. On April 28, two of the four Parkersburg, West Virginia unit employees, Wiseman and Wiggins, participated in the negotiations on official time while Meredith and Bloomer took annual leave for the day. On April 29, Meredith and Bloomer participated as members of the Union negotiating team while Wiseman and Wiggins took annual leave.

On July 14, 1981 the Union requested reinstatement of annual leave taken by the four unit employees on April 27. Further, it requested official time for travel from Parkersburg, West Virginia to Washington, D.C. on July 6, 1981 and for return travel to Parkersburg on July 9, 1981

3/ Section 7131(a) of the Statute provides:

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

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incurred by Bloomer and Wiseman who served as members of the negotiating team during sessions on July 7 and July 8, 1981. The Respondent denied the Union's request on July 15, 1981 and Bloomer and Wiseman took annual leave for the July 6 and July 9 travel time.

The Authority has held that when it is required that an employee travel to participate in activities for which the employee would be on official time under section 7131(a) of the Statute, during the time the employee would be in a duty status, such travel time is part of the official time.4/ Thus, by refusing to grant official time to unit employees on April 27, 1981, July 6, 1981 and July 9, 1981 for travel in connection with contract negotiations while they were representing the Union and during which they would be on official time, the Respondent failed to comply with section 7131(a) of the Statute, in violation of section 7116(a)(1) and (8).

With respect to the amount of official time requested for the four Parkersburg employees to travel on April 27, 1981 to contract negotiating sessions, section 7131(a) limits official time granted under that section to the number of employees "not to exceed the number . . . representing the agency." Therefore, the number of union representatives who must be paid for their representation time is pegged to the number of agency representatives. Department of Health and Human Services, Region IV, Atlanta, Georgia, 9 FLRA 1065, 1066 n.2 (1982). The stipulated facts show that five employees were designated as participating union representatives at the April 28 and 29 negotiating sessions and were afforded official time in respect thereto, the same as the number of individuals on the management negotiating team who participated during those sessions. It is noted further that of the five positions on the Union negotiating team, two positions were allocated to the four Parkersburg employees and official time was concededly afforded to only two of these employees. The Authority concludes that, as travel time is included in official time and the same limits apply, the entitlement to official time for travel in this instance is an amount equivalent to that necessary for two employees representing the Union to travel from Parkersburg, West Virginia, to Washington, D.C.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the

4/ Department of the Treasury, Bureau of the Public Debt, 14 FLRA 197 (1984). See also Florida National Guard, 5 FLRA 365 (1980), reversed as to other matters sub nom. Florida National Guard v. Federal Labor Relations Authority, 699 F.2d 1082 (11th Cir. 1983).

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Authority hereby orders that the Department of the Treasury, Bureau of the Public Debt shall:

1. Cease and desist from:

(a) Refusing to provide official time for travel on April 27, 1981 for two employees designated as representatives of the National Treasury Employees Union and Chapter 190, the employees' exclusive representative, in connection with contract negotiations, pursuant to section 7131(a) of the Federal Service Labor-Management Relations Statute, and for travel on July 6 and July 9, 1981 to employees Wanda Wiseman and Ed Bloomer as designated representatives of National Treasury Employees Union and Chapter 190 in connection with contract negotiations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Grant official time to two employees designated by the National Treasury Employees Union and Chapter 190 for time spent on April 27, 1981 while in a travel status in connection with contract negotiations and restore an equivalent amount of annual leave used, and to employees Wanda Wiseman and Ed Bloomer for the time spent on July 6 and July 9, 1981 while in a travel status in connection with negotiations and make them whole for annual leave used.

(b) Post at all of its offices copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Bureau of the Public Debt, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

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(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to provide official time for travel on April 27, 1981 for two employees designated as representatives of the National Treasury Employees Union and Chapter 190, the employees' exclusive representative, in connection with contract negotiations, pursuant to section 7131(a) of the Federal Service Labor-Management Relations Statute, and for travel on July 6 and July 9, 1981 to employees Wanda Wiseman and Ed Bloomer as designated representatives of National Treasury Employees Union and Chapter 190 in connection with contract negotiations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL grant official time to two employees designated by the National Treasury Employees Union and Chapter 190 for time spent on April 27, 1981 while in a travel status in connection with contract negotiations and restore an equivalent amount of annual leave used, and to employees Wanda Wiseman and Ed Bloomer for time spent on July 6, and July 9, 1981

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while in a travel status in connection with negotiations and make them whole for annual leave used.

_____
(Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, N.W., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8452.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and

Case No. O-NG-841

KANSAS CITY DISTRICT
CORPS OF ENGINEERS,
KANSAS CITY, MISSOURI

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), and raises issues regarding the negotiability of the following Union proposal:1/

Union Proposal

1. GENERAL: The use of Government quarters during temporary (TDY) assignments to military posts, camps, stations or depots owned and operated by the United States (installation) may be required under certain conditions. Use of Government quarters by Unit employees is not mandatory. However, non-utilization of 'available,' 'adequate' Government quarters can result in forfeiture of the quarters portion (50%) of the per diem allowance.

2. DEFINITION OF 'ADEQUATE' GOVERNMENT QUARTERS: Adequate Government quarters shall:

1/ In its Statement of Position in response to the Union's appeal, the Agency contends for the first time that two additional sections of the Union's proposal, sections 3(b) and (c), are outside the duty to bargain. These sections were not appealed by the Union and, therefore, are not before the Authority at this time. See section 7117(c)(3) of the Statute and section 2424.1 of the Authority's Rules and Regulations.

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(a) be of size outlined in Joint Travel regulations;

(b) have a private entrance and bath, and provide for double or single occupancy at employee's option;

(c) have daily maid service, including fresh linens daily and water cups;

(d) have adequate eating facilities (available to general public) within walking distance for all meals, seven days a week, open from 6 a.m. to 10 p.m. at a minimum;

(e) have adequate laundry and dry cleaning service within walking distance;

(f) be properly air conditioned, heated, and ventilated;

(g) be properly working television in room;

(h) have alarm clock available or alternative wake-up service;

(i) have commercial transportation (bus/taxi) available for use after non-duty hours;

(j) be clean and neat with attractive decor.

3. DEFINITION OF 'AVAILABLE' GOVERNMENT QUARTERS: Available Government quarters shall:

(a) fulfill the 'adequacy' definition;

(b) be open for occupancy upon arrival of employee at the TDY station;

(c) have been booked by the Employer, at request of employee, at least a week prior to the employee's arrival.

4. UTILIZATION OF GOVERNMENT QUARTERS DETERMINATION:

The Employer (order issuing official) will, prior to employee being issued travel orders, determine if the TDY is to a Government installation. The following action will apply if:

(a) the TDY is to a Government installation, and 'adequate' Government quarters are available, then:

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(1) the Employer will advise the employee of the availability of adequate Government quarters and that the non-use of them will result in the forfeiture of the quarters portion (50%) of the per diem allowance unless the employee secures a non-availability certificate from the installation Commander; and

(2) the Employer will record "Reimbursement limited to the use of Government quarters unless statement of non-availability and lodging receipts are furnished" in the remarks section of travel order; . . . [Only the underlined portions are in dispute.]

Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations. The disputed portions of the Union's proposal would establish standards of adequacy for government quarters utilized by civilian employees as accommodation while on temporary duty and would define the term "available" to include only those quarters which are adequate. The Agency refuses to negotiate over the proposal contending, among other things, that it is inconsistent with Agency regulations[2/] for which a compelling need exists and, therefore, is not within the duty to bargain under section 7117(a)(2) of the Statute.[3/] The Union, however, disputes the Agency's contention claiming that a conflict does not exist between its proposal and the Agency's regulations and, in the event that a conflict does exists, there is no compelling need for the Agency's regulations. Thus, the proposal and arguments raised by the parties in

2/ The regulations which the Agency contends that the proposal is inconsistent therewith include the Department of Defense Civilian Personnel, Volume 2, Joint Travel Regulations and the Department of Defense Instruction 4165.47, Adequacy, Assignment, Utilization, and Inventory of Unaccompanied Personnel Housing.

3/ Section 7117(a)(2) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

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the instant petition are identical in effect to those at issue in National Federation of Federal Employees, Local 561 and Department of the Army, U.S. Army Corps of Engineers, Mobile, Alabama, 17 FLRA No. 105 (1985), wherein the Authority ruled that the proposal conflicted with Agency regulations for which a compelling need existed. Hence, for the reasons stated and the case cited in Department of Army, U.S. Army Corps of Engineers, Mobile, Alabama, the Authority concludes that the Union's proposal conflicts with Agency regulations for which a compelling need exists. Therefore, based upon the arguments of the parties, the Authority concludes that the proposal is outside the duty to bargain under the Statute.5/

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ In view of the decision herein, the Authority finds it unnecessary to address the remaining contentions of the Agency as to the negotiability of the proposal.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF HEARINGS AND APPEALS

Activity

and

Case No. 0-AR-842

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3506

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator John F. Caraway filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

A grievance was filed and submitted to arbitration claiming that the Activity's denial of a within-grade increase to the grievant was contrary to the parties' collective bargaining agreement. Although the Arbitrator found that the grievant's performance appraisal rating of minimally satisfactory was grounds for denying her increase, he noted that the parties had negotiated strict requirements surrounding the denial of a within-grade increase. In this respect he determined that the Activity had not fully complied with the requirements of the agreement and he held that therefore he was required to rescind the denial. Accordingly, as his award in this regard, the Arbitrator directed that the grievant be granted her within-grade increase retroactively with backpay.

In its exception the Agency primarily contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596. The Authority agrees.

The Authority has uniformly held that in order for an award of backpay to be authorized under the Back Pay Act, there must not only be a determination that an employee was affected by an unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee would otherwise have earned or received.

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E.g., American Federation of Government Employees, Local 51 and U.S. Department of the Mint, Old Mint Building, Customer Service Division, 15 FLRA No. 164 (1984). In addition, with respect to the withholding or denying of a within-grade increase, the Authority has recognized under 5 U.S.C. § 5335(a)[1/] that in order for an employee to be entitled to the increase, the work of the employee must be determined to be at an acceptable level of competence. Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA No. 76 (1984). Thus, in order for an award by an arbitrator of a retroactive within-grade increase to be authorized, the arbitrator must find that agency action in connection with the withholding or denying of the increase was unwarranted and that but for the unwarranted action, the grievant otherwise would have received the within-grade increase. In this regard, the arbitrator must find either that the negative determination (the determination that the work of the grievant was not at an acceptable level of competence) was not sustained or that due to some action or failure to take action on the part of the agency, the work of the grievant was determined not to be at an acceptable level of competence when it otherwise would have been. See id. at 2. In terms of this case, although the Arbitrator found that the Agency had failed to fully comply with the collective bargaining agreement, he erroneously concluded that at that point, he was required to rescind the denial of the grievant's within-grade increase. Thus, the Arbitrator did not find that but for the Activity's failure to fully comply with the agreement, constituting the unwarranted action, the grievant's work would have been determined to have been at an acceptable level of competence which would have resulted in the granting of the within-grade increase. Consequently, in view of the grievant's performance rating[2/] and the Arbitrator's failure to make the necessary finding, the award of a retroactive within-grade increase is deficient as contrary to 5 U.S.C. § 5596. Accordingly, the award is modified by striking the first paragraph.

Issued, Washington, D.C. May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

1/ 5 U.S.C. § 5335(a) provides that an employee in the General Schedule shall be advanced to the next higher salary rate within his or her grade at certain intervals provided, among other things, that the work of the employee is at an acceptable level of competence as determined by the head of the agency.

2/ The Authority has previously noted that 5 C.F.R. § 430.202(e) (1984 Supp.), which implements 5 U.S.C. § 4301(3), requires the denial of a within-grade increase when an employee's performance in any critical element is below a minimum standard. See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2027 and Action, Washington, D.C., 12 FLRA 643, 646-47 (1983).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. 0-AR-769

INTERNAL REVENUE SERVICE

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator John Kagel filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.

The grievance in this case involved the determination that the grievant was not performing at an acceptable level of competence (the negative determination) and the Agency's denial to her of a within-grade increase. The grievant's requested reconsideration of the negative determination was denied, and the grievance was thereafter filed and submitted to arbitration. The Arbitrator found that the file required to be prepared when an employee requests reconsideration was not fully prepared as required and was not prepared in a fashion which allowed the grievant to appropriately present her defense. He ruled that these actions by the Agency constituted a violation of the parties' collective bargaining agreement and that under decisions of the Merit Systems Protection Board (MSPB) applying 5 U.S.C. § 7701(c)(2)(A)1/ to this type of case, these actions constituted harmful error requiring the overturning of the denial of the increase to the grievant. Accordingly, the Arbitrator directed that the grievant be granted her within-grade increase retroactively.

1/ Section 7701(c)(2)(A) pertinently provides that MSPB may not sustain the agency's decision in any action appealed to MSPB if the employee shows harmful error in the application of the agency's procedures in arriving at such decision.

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In its exceptions, the Agency contends, among other things, that the award is contrary to law. The Authority agrees.

The Authority has uniformly held that in order for an award of backpay to be authorized under the Back Pay Act, 5 U.S.C. § 5596, there must be not only a determination that the aggrieved employee was affected by an unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee would otherwise have earned or received. E.g., American Federation of Government Employees, Local 51 and U.S. Department of the Mint, Old Mint Building, Customer Service Division, 15 FLRA No. 164 (1984). In addition, with respect to the denial or withholding of a within-grade increase, the Authority has recognized under 5 U.S.C. § 5335(a) that in order for an employee to be entitled to the increase, the work of the employee must be determined to be at an acceptable level of competence. Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA No. 76 (1984). Thus, in order for an award by an arbitrator of a retroactive within-grade increase to be authorized, the arbitrator must find that agency action in connection with the denying or withholding of the increase was unwarranted and that but for the unwarranted action, the grievant otherwise would have received the within-grade increase. In this regard the arbitrator must find either that the negative determination was not sustained or that due to some action or failure to take action on the part of the agency, the work of the grievant was determined not to be at an acceptable level of competence when it otherwise would have been. See id. at 2. In terms of this case, although the Arbitrator found that the Agency's actions violated the collective bargaining agreement, constituting the unwarranted action, the Arbitrator did not find that but for this violation, the grievant's work otherwise would have been determined to have been at an acceptable level of competence which would have resulted in the granting of the within-grade increase. Consequently, the award is contrary to the Back Pay Act and 5 U.S.C. § 5335(a). Furthermore, the award is not authorized by 5 U.S.C. § 7701(c). Contrary to the finding of the Arbitrator and the argument of the Union in opposition to the Agency's exceptions, the grievant's showing of harmful error within the meaning of section 7701(c)(2)(A) did not authorize the Arbitrator's overturning of the Agency's denial of the within-grade increase and did not authorize his granting of that increase retroactively. In this regard, the Authority has previously held that section 7701(c) expressly pertains only to the appellate procedures of MSPB in reviewing agency decisions in any action appealed to MSPB and that accordingly section 7701(c) is not applicable to grievances submitted to arbitration. E.g., Naval Weapons Station, Yorktown, Virginia and National Association of Government Employees, Local R4-96, 13 FLRA 133 (1983). At the same time, the Authority

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recognized that under section 7121(e)(2) of the Statute,[2] an arbitrator in certain matters is governed by the standards set forth in section 7701(c). Id. at 134. However, that section of the Statute does not pertain to the denying or withholding of within-grade increases, and therefore neither that section nor the standards set forth in section 7701(c) apply in this case. Consequently, the Authority concludes that the Arbitrator was not authorized under the terms of section 7701(c)(2)(A) or otherwise to overturn the Agency's action solely on finding harmful error. Thus, the Arbitrator's granting of a retroactive within-grade increase is deficient as contrary to 5 U.S.C. § 5335(a) and § 5596 and is not otherwise authorized by 5 U.S.C. § 7701(c)(2)(A).

Accordingly, the award is modified by striking the granting of the increase.[3]

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ Section 7121(e)(2) provides: "In matters covered under sections 4303 and 7512 of [title 5] which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of [title 5], as applicable."

3/ In view of this decision, it is not necessary that the Authority address the other exceptions to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-744

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Robert H. Mount filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

A grievance was filed and submitted to arbitration challenging the withholding of the grievant's within-grade increase. The Arbitrator concluded that the Agency had improperly denied the grievant the full contractual period to show improvement prior to the date on which she became eligible for the salary increase. As his award, the Arbitrator therefore directed that the grievant be granted the within-grade increase retroactively with backpay.

In its exception the Agency primarily contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, and 5 U.S.C. § 5335(a).*/ The Authority agrees.

*/ 5 U.S.C. § 5335(a) provides that an employee in the General Schedule shall be advanced to the next higher salary rate within his or her grade at certain intervals provided, among other things, that the work of the employee is at an acceptable level of competence as determined by the head of the agency.

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The Authority has uniformly held that in order for an award of backpay to be authorized under the Back Pay Act, there must be not only a determination that the aggrieved employee was affected by an unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee would otherwise have earned or received. E.g., American Federation of Government Employees, Local 51 and U.S. Department of the Mint, Old Mint Building, Customer Service Division, 15 FLRA No. 164 (1984). In addition, with respect to the denying or withholding of a within-grade increase, the Authority has recognized under 5 U.S.C. § 5335(a) that in order for an employee to be entitled to the increase, the work of the employee must be determined to be at an acceptable level of competence. Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA No. 76 (1984). Thus, in order for an award by an arbitrator of a retroactive within-grade increase to be authorized, the arbitrator must find that agency action in connection with the withholding or denying of the increase was unwarranted and that but for the unwarranted action, the grievant otherwise would have received the within-grade increase. In this regard the arbitrator must find either that the negative determination (the determination that the work of the grievant was not at an acceptable level of competence) was not sustained or that due to some action or failure to take action on the part of the agency, the work of the grievant was determined not to be at an acceptable level of competence when it otherwise would have been. See id. at 2. In terms of this case, although the Arbitrator found that the Agency had acted improperly, the Arbitrator did not find that but for the denial of an opportunity for improvement prior to the date on which she became eligible for the increase, the grievant's work otherwise would have been determined to have been at an acceptable level of competence which would have resulted in the granting of the within-grade increase. Consequently, the Arbitrator's granting of a retroactive within-grade increase is contrary to 5 U.S.C. § 5335(a) and 5 U.S.C. § 5596 and is struck from the award.

Issued, Washington, D.C. May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-731

LOCAL 1760, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Susan T. Mackenzie filed by the Agency and the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

The parties submitted to arbitration the issue of whether the Activity's decision to withhold the within-grade increase of the grievant was proper. The Arbitrator found that the Activity had sustained its determination that the grievant's performance was not at an acceptable level of competence (the negative determination). However, the Arbitrator also found that the Activity had violated the parties' collective bargaining agreement by not affording the grievant a minimum of 60 days in which to improve before deciding to withhold the within-grade increase and that the violation constituted harmful error. As her award, the Arbitrator therefore directed that the grievant be given a new 60-day period to demonstrate improvement and that should she demonstrate during this period that she is performing at an acceptable level of competence, the grievant be granted retroactive to February 7, 1983, a within-grade increase.

In its exceptions to the award, the Agency primarily contends that by providing for the granting retroactively of a within-grade increase to the grievant, the award is contrary to 5 U.S.C. § 5335(a) and § 5596. The Authority agrees.

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The Authority has uniformly held that in order for an award of backpay to be authorized under the Back Pay Act, 5 U.S.C. § 5596, there must be not only a determination that the aggrieved employee was affected by an unwarranted personnel action, but also a determination that such unwarranted action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee would otherwise have earned or received. E.g., American Federation of Government Employees, Local 51 and U.S. Department of the Mint, Old Mint Building, Customer Service Division, 15 FLRA No. 164 (1984). In addition, with respect to the denying or withholding of a within-grade increase, the Authority has recognized under 5 U.S.C. § 5335(a) that in order for an employee to be entitled to the increase, the work of the employee must be determined to be at an acceptable level of competence. Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA No. 76 (1984). Thus, in order for an award by an arbitrator of a retroactive within-grade increase to be authorized, the arbitrator must find that agency action in connection with the withholding or denying of the increase was unwarranted and that but for the unwarranted action, the grievant otherwise would have received the within-grade increase. In this regard, the arbitrator must find either that the negative determination was not sustained or that due to some action or failure to take action on the part of the agency, the work of the grievant was determined not to be at an acceptable level of competence when it otherwise would have been. See id. at 2. In terms of this case, as has been noted, the Arbitrator did find that the Activity had violated the parties' collective bargaining agreement. However, the Arbitrator also found that the Activity had sustained its negative determination, and the Arbitrator did not find that but for the Activity's failure to afford the grievant a minimum of 60 days in which to improve, the grievant's work otherwise would have been determined to have been at an acceptable level of competence which would have resulted in the granting of the within-grade increase. Consequently, the Arbitrator's provision for a retroactive within-grade increase is contrary to 5 U.S.C. § 5335(a) and § 5596 and must be modified.1/

In its exception to the award the Union contends that the award is deficient as contrary to 5 U.S.C. § 7701(c) because the Arbitrator was required to grant the grievant the within-grade increase on finding that the Activity's violation of the collective bargaining agreement was

1/ The Authority has previously noted that 5 C.F.R. § 430.202(e) (1984 Supp.), which implements 5 U.S.C. § 4301(3), requires the denial of a within-grade increase when an employee's performance in any critical element is below a minimum standard. See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2027 and Action, Washington, D.C., 12 FLRA 643, 646-47 (1983).

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harmful error and because the Arbitrator found that the Activity had sustained its negative determination by using the standard of substantial evidence rather than the standard of preponderance of the evidence, which the Union claims is required by section 7701(c)(1)(B).2/ The Authority however concludes that the Union fails to establish that the award is deficient in these respects.

In this regard the Authority has previously held that section 7701(c) expressly pertains only to the appellate procedures of the Merit Systems Protection Board (MSPB) in reviewing agency decisions in any action appealed to MSPB and that accordingly section 7701(c) is not applicable to grievances submitted to arbitration. E.g., Naval Weapons Station, Yorktown, Virginia and National Association of Government Employees, Local R4-96, 13 FLRA 133 (1983). At the same time, the Authority recognized that under section 7121(e)(2) of the Statute,3/ an arbitrator in certain matters is governed by the standards set forth in section 7701(c). However, that section of the Statute does not pertain to the denying or withholding of within-grade increases and therefore neither that section nor the standards set forth in section 7701(c) applies in this case. Consequently, contrary to the argument of the Union, and in view of the findings necessary to a proper award of a retroactive within-grade increase discussed with respect to the Agency's

2/ Section 7701(c) pertaining to the appellate procedures of the Merit Systems Protection Board pertinently provides:

> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-
>
> > (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
> >
> > (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-
>
> > (A) shows harmful error in the application of the agency's procedures in arriving at such decision[.]

3/ Section 7121(e)(2) provides: "In matters covered under sections 4303 and 7512 of [title 5] which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of [title 5], as applicable."

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exception, the Arbitrator correctly did not grant a retroactive increase on finding harmful error alone, and the award therefore is not deficient in this respect. Similarly, contrary to the contention of the Union respecting the standard of proof, with neither section 7701(c) nor its standards applicable to this case, no specific standard of proof is required by law. In this regard the Authority has held that unless a specific standard of proof is required, an arbitrator may establish whatever standard the arbitrator considers appropriate and the award is not subject to being found deficient on that basis. Department of Defense Dependent Schools, Europe and Overseas Education Association, 4 FLRA 412 (1980). Furthermore, the Union has additionally failed to establish that section 7701(c)(1) requires the application of the standard of preponderance of the evidence to denials of within-grade increases. Although three U.S. courts of appeal have held that the standard of preponderance of the evidence of section 7701(c)(1)(B) applies to denials of within-grade increases,4/ the standard determined by MSPB and the U.S. Court of Appeals for the Federal Circuit, the court of appeals with exclusive jurisdiction in the review of MSPB decisions, to be required by section 7701(c)(1) is substantial evidence. Parker v. Defense Logistics Agency, 1 MSPB 489 (1980); Gordon v. Veterans Administration, No. 84-1327 (Fed. Cir. Dec. 11, 1984). For these reasons the Union's exception provides no basis for finding the award deficient.

Accordingly, the Union's exception is denied, and on the basis of the Agency's exception the award is modified by striking "retroactive to February 7, 1983" and inserting "prospectively."5/

Issued, Washington, D.C., May 13, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ Ommaya v. National Institutes of Health, 726 F.2d 827 (D.C. Cir. 1984); White v. Department of the Army, 720 F.2d 209 (D.C. Cir. 1983), Stankis v. EPA, 713 F.2d 1181 (5th Cir. 1983); Schramm v. Department of Health and Human Services, 682 F.2d 85 (3d Cir. 1982).

5/ In view of this decision, it is not necessary to address the Agency's other exception to the award.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
U.S. ARMY TRANSPORTATION CENTER
FORT EUSTIS, VIRGINIA

Activity

and

Case No. 4-RO-30036
(16 FLRA No. 107)

LOCAL 19, FEDERAL FIREFIGHTERS
ASSOCIATION

Petitioner

and

LOCAL 1625, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Intervenor

ORDER DENYING MOTION FOR RECONSIDERATION

This case is before the Authority on a motion for reconsideration filed by the Petitioner on December 31, 1984, seeking reconsideration of the Authority's Decision and Order of December 13, 1984. For the reason set forth below, the motion must be denied.

Section 2429.17 of the Authority's Rules and Regulations, effective September 10, 1981, provides in pertinent part:

2429.17 Reconsideration.

After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

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The Authority's Decision and Order was dated and served on the union by mail on December 13, 1984. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which are also applicable to the computation of the time limit here involved, the Petitioner's motion for reconsideration was due in the national office of the Authority before the close of business on December 28, 1984. Since, as indicated above, the Petitioner's motion was not filed until December 31, 1984, it is clearly untimely and must be denied.

Accordingly, for the reason set forth above,

IT IS ORDERED that the Petitioner's motion for reconsideration in this case be, and it hereby is, denied.

For the Authority.

Issued, Washington, D.C., January 14, 1985

Harold D. Kessler
Acting Executive Director/Administrator

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PUEBLO DEPOT ACTIVITY
PUEBLO, COLORADO

Activity

and

Case Nos. 7-CU-40016
7-CU-40020

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-5

Union

ORDER DISMISSING APPLICATION FOR REVIEW

This case is before the Authority pursuant to section 7105(f) of the Federal Service Labor-Management Relations Statute and section 2422.17 of the Authority's Rules and Regulations on an application for review of the Regional Director's Decision and Order on Petitions for Clarification of Unit. For the reasons indicated below, it has been determined that the Union's application for review was untimely filed and must be dismissed on that basis.

Under section 7105(f) of the Statute and section 2422.17(a) of the Authority's Rules and Regulations, the time limit for filing an application for review of the Regional Director's Decision and Order with the Authority is within 60 days of such action. The 60 day time limit for the filing of an application for review may not be extended or waived.

The Regional Director's Decision and Order in this case was dated and issued on December 31, 1984. Therefore, under section 2422.17(a) of the Authority's Rules and Regulations, and as stated in the Regional Director's Decision and Order, the application for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on March 1, 1985. However, the application for review was not filed until March 4, 1985, and thus was untimely under the Authority's rules of procedure.

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Accordingly, as the Union's application for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 6, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1931

Union

and

Case No. 0-NG-1103
(17 FLRA No. 7)

U.S. DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION
CONCORD, CALIFORNIA

Activity

ORDER GRANTING REQUEST FOR RECONSIDERATION

This matter is before the Authority pursuant to the Union's request for reconsideration of the Authority's Order of February 19, 1985, dismissing the Union's petition for review as untimely filed.

The Union has established that the Activity's allegation of nonnegotiability dated January 3, 1985, was not properly served on the Union by mail as the allegation was addressed to an incorrect zip code. Therefore, it has been determined that the Union's petition for review was timely filed. Accordingly, the Authority's Order of February 19, 1985, dismissing the petition as untimely filed is hereby rescinded and the case is reopened for further processing.

Consistent with section 2424.6 of the Authority's Rules and Regulations, the Activity shall have 30 days from the date of receipt of this Order to file a statement of position with the Authority. The statement of position must be served on the Union, and a statement of service must be included with the Activity's submission to the Authority.

With regard to the Union's request that the Authority seek a temporary restraining order in this case, under section 2423.9 of the Authority's Rules and Regulations, such a request must be filed with the appropriate regional office of the Authority in connection with an unfair labor practice case. There is no provision in the Rules and Regulations for the filing of such a request in a negotiability case. Therefore, the Union's request is hereby dismissed without prejudice to properly filing its request with the

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appropriate Regional Director in connection with an unfair labor practice case.

For the Authority.

Issued, Washington, D.C., March 12, 1985

Harold D. Kessler
Managing Director for Case Processing

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF LABOR

Activity/Petitioner

and Case No. 3-CU-40017

NATIONAL COUNCIL OF FIELD LABOR LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

LABOR MANAGEMENT SERVICES ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

Activity/Petitioner

and Case No. 3-CU-40018

NATIONAL UNION OF COMPLIANCE OFFICERS, INDEPENDENT

Labor Organization

UNITED STATES DEPARTMENT OF LABOR

Activity/Petitioner

and Case No. 3-CU-40019

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO

Labor Organization

ORDER GRANTING APPLICATIONS FOR REVIEW AND REQUEST FOR STAY

On January 29, 1985, the United States Department of Labor (DOL) and the National Union of Compliance Officers, Independent (NUCO) filed timely applications for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Petitions for Clarification of Unit in

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the above-named cases.[1/] NUCO also filed a request for a stay of such Decision and Order on Petitions for Clarification of Unit. In support of their applications, both DOL and NUCO contend that compelling reasons within the meaning of section 2422.17(c) of the Authority's Rules and Regulations exist for granting such applications.[2/] Both NUCO and DOL filed oppositions to each other's application for review.

Upon consideration of the applications for review filed by DOL and NUCO, including the arguments in support thereof, it appears to the Authority that compelling reasons exist for granting the applications for review pursuant to the provisions of section 2422.17(c)(1) of the Authority's Rules and Regulations. More specifically, it appears that substantial questions of law or policy are raised because of the absence of specific Authority precedent with respect to the following:

> (1) The relationship between section 7112(b)(4) and section 7135(a)(1) of the Statute, and the applicability of these sections to the facts and circumstances of these cases.
>
> (2) Whether the employees in the Office of Pension and Welfare Benefit Programs at issue herein are engaged in administering any provision of law relating to labor-management relations within the meaning of section 7112(c) of the Statute, and the effect of section 7112(c) on the appropriateness of their inclusion in other bargaining units as sought by the Petitioner.

The parties also may wish to address particularly the historical bargaining relationship between the agency and labor organizations involved, and what they consider to be the relationship between the applicable provisions of Executive Order 11491, as amended, and the Federal Service Labor-Management Relations Statute.

1/ Pursuant to section 2422.5(a) of the Authority's Rules and Regulations, NUCO is additionally deemed to be an intervenor in Case Nos. 3-CU-40017 and 3-CU-40019.

2/ Section 2422.17(c) provides:

> (c) The Authority may grant an application for review only where it appears that compelling reasons exist therefor. Accordingly, an application for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent;

(Continued)

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Accordingly, pursuant to section 2422.17(g) of the Authority's Rules and Regulations, IT IS ORDERED that the applications for review be, and they hereby are, granted, and the parties are hereby notified that they may file briefs with the Authority concerning the above issues on or before April 16, 1985. IT IS FURTHER ORDERED that the request for a stay of the Regional Director's Decision and Order on Petitions for Clarification of Unit be, and it hereby is, granted pending the Authority's final action with respect to the applications for review.

Issued, Washington, D.C., April 1, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

(2) That there are extraordinary circumstances warranting reconsideration of an Authority policy;

(3) That the conduct of the hearing held or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) That the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION
YORKTOWN, VIRGINIA

Respondent

and

Case Nos. 4-CA-20041
4-CA-20271
4-CA-20295
(16 FLRA No. 72)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-1

Charging Party

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority on a request for reconsideration filed by the Charging Party on April 3, 1985, seeking reconsideration of the Authority's Decision and Order of November 15, 1984, with respect to Case Nos. 4-CA-20041 and 4-CA-20271. For the reason set forth below, the request must be denied.

Section 2429.17 of the Authority's Rules and Regulations, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. . . .

The Authority's Decision and Order was dated and served on the Charging Party by mail on November 15, 1984. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which are also applicable to the computation of the time limit here involved, the Charging Party's request for reconsideration was due in the national office of the Authority before the close of business on December 3, 1984.

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Since, as indicated above, the Charging Party's request was not filed until April 3, 1985, it is clearly untimely and must be denied.*/

Accordingly, for the reason set forth above, and apart from other considerations, the Charging Party's request for reconsideration is hereby denied.

For the Authority.

Issued, Washington, D.C., April 11, 1985

Harold D. Kessler
Managing Director for Case Processing

*/ As to the matters raised in your request related to effectuation of the Authority's Decision and Order in the above-referenced case, section I.B. of Appendix B of the Authority's Rules and Regulations (5 CFR Chap. XIV (1985), Appendix B, § I.B.) provides: "The General Counsel is authorized and responsible, on behalf of the Authority, to seek and effect compliance with the Authority's Orders and make such compliance reports to the Authority as it may from time to time require." Accordingly, matters related to compliance should appropriately be raised with the General Counsel or the appropriate Regional Director.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY FIELD ARTILLERY CENTER
FORT SILL, OKLAHOMA

Activity

and

Case No. 6-RO-40005

GENERAL DRIVERS, CHAUFFEURS AND
HELPERS, LOCAL UNION NO. 886
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS
WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 273

Intervenor

ORDER DENYING APPLICATION FOR REVIEW

On February 14, 1985, the National Federation of Federal Employees, Local 273 (NFFE) filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Direction of Election in the above-named case. NFFE also filed a request for a stay of such Decision and Direction of Election. In support thereof, NFFE contends that compelling reasons within the meaning of section 2422.17(c) of the Authority's Rules and Regulations exist for granting the application.1/

1/ Section 2422.17(c) provides:

> (c) The Authority may grant an application for review only where it appears that compelling reasons exist therefor. Accordingly, an application for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent;
>
> (2) That there are extraordinary circumstances warranting reconsideration of an Authority policy;

(Continued)

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Upon consideration of NFFE's application for review, including all arguments in support thereof, the Authority concludes that no compelling reasons exist for granting this application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings, which have not been shown to be clearly erroneous.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review and request for a stay of the Regional Director's Decision and Direction of Election be, and they hereby are, denied.2/

Issued, Washington, D.C., April 15, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

(3) That the conduct of the hearing held or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) That the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party.

2/ The Authority, while agreeing with the Regional Director's Direction of Election in the circumstances of this case, specifically disavows his statement that section 7114(c) of the Statute requires that the approval date by the head of the agency appear on the face of the agreement. In this regard, the Authority notes particularly that the agreement contains neither an expiration date nor the date that the agreement was approved pursuant to section 7114(c) of the Statute by the United States Army Training and Doctrine Command. While Article XXXIV, Section 1 of the parties' agreement states in part that "[t]his agreement shall remain in full force and effect for 3 years from the date of approval[,]" (emphasis added), neither the approval by the agency head nor the expiration date can be ascertained with certainty by a potential challenging party seeking to file a petition during the statutory 60-105 day open period. In the absence of a definitive expiration date, a collective agreement cannot serve as a bar to a representation petition. See Department of the Army, U.S. Army Concord District Recruiting Command, 14 FLRA 73 (1984).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
U.S. ARMY TRANSPORTATION CENTER
FORT EUSTIS, VIRGINIA

Activity

and

Case No. 4-RO-30036
(16 FLRA No. 107)

LOCAL 19, FEDERAL FIREFIGHTERS
ASSOCIATION

Petitioner

and

LOCAL 1625, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Intervenor

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Authority on a timely motion for reconsideration of the Authority's Decision and Order in Department of the Army, U.S. Army Transportation Center, Fort Eustis, Virginia, 16 FLRA No. 107 (1984), filed by the Petitioner.*/

Section 2429.17 of the Authority's Rules and Regulations provide, in part, that a party who can establish extraordinary circumstances may move for reconsideration of an Authority decision. Based upon review of the Petitioner's arguments in support of its motion, the Authority concludes that the motion raises no issue not previously raised before or considered by the Authority, and that no extraordinary circumstances warranting reconsideration have been established. Rather, the arguments made in support of the motion merely constitute disagreement with the merits of the Authority's Decision.

*/ On January 14, 1985, the Authority dismissed the untimely Motion For Reconsideration initially filed by the Petitioner on December 31, 1984. Thereafter, the Petitioner, citing improper service of the original decision, requested that this dismissal order be rescinded. Accordingly, in view of such improper service, the Authority's Order Denying Motion for Reconsideration dated January 14, 1985 is rescinded and the Petitioner's Motion for Reconsideration is hereby considered.

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Accordingly, IT IS ORDERED that the Petitioner's motion for reconsideration in this case be, and it hereby is, denied.

Issued, Washington, D.C., April 19, 1985

Henry B. Frazier III, Acting Chairman

William J. McGinnis, Jr., Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1533, AFL-CIO

Union

and

Case No. 0-AR-841
(16 FLRA No. 25)

NAVY RESALE AND SERVICES OFFICE,
DEPARTMENT OF THE NAVY, OAKLAND, CALIFORNIA

Activity

AMENDED ORDER DISMISSING EXCEPTIONS

On October 2, 1984, the Authority issued an Order dismissing the Union's exceptions because the Arbitrator's award related to a matter described in section 7121(f) of the Statute,1/ i.e., the grievant's removal, and, therefore, the Authority was without jurisdiction to review the Union's exceptions pursuant to section 7122(a) of the Statute.2/ In reaching that decision, it was determined that the grievant's removal was an adverse action covered under 5 U.S.C. § 7512. The Union subsequently filed a submission establishing that the grievant was a nonappropriated

1/ Section 7121(f) provides, in part:

> . . . In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

2/ Section 7122(a) of the Statute provides, in part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). . . .

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fund employee and that his removal was not subject to the provisions of 5 U.S.C. § 7512. Therefore, the Authority's Order of October 2, 1984, must be amended to correct the determination regarding the removal action.

Accordingly, the Authority's Order of October 2, 1984, is amended to provide that since the Arbitrator's award relates to a matter similar to one covered by 5 U.S.C. § 7512 which arose under another personnel system, the Authority is without jurisdiction to review the Union's exceptions.3/ Review of an award relating to such a similar matter may only be obtained in accordance with applicable law and regulations.

For the Authority.

Issued, Washington, D.C., April 23, 1985

Harold D. Kessler
Managing Director for Case Processing

3/ As noted above, the matters described in section 7121(f) of the Statute include matters similar to those covered under 5 U.S.C. § 7512 which arise under other personnel systems and, therefore, under section 7122(a) exceptions to an award concerning such similar matters may not be filed with the Authority. See, e.g., Veterans Administration Medical Center, Hines, Illinois and Illinois Nurses Association, Hines Local Unit, 16 FLRA No. 46 (1984).

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 405

Union

and

Case No. 0-AR-895

U.S. ARMY AVIATION RESEARCH
AND DEVELOPMENT COMMAND

Activity

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority on a request by Mr. Rocklin D. Akins, the grievant in the case, essentially seeking reconsideration of the Authority's Decision of April 5, 1985, denying the Union's exceptions to the award of Arbitrator Merton Bernstein. In that decision, the Authority concluded, based upon careful consideration of the entire record before it, that the Union had failed to establish that the award was deficient on any of the grounds set forth in section 7122(a) of the Statute. For the reason set forth below, Mr. Rocklin's request must be denied.

Section 2429.17 of the Authority's Rules and Regulations provides in pertinent part:

> § 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. [Emphasis added.]

The parties in the proceeding before the Authority were the Union and the Activity. Consequently, since Mr. Rocklin was not a party to the proceeding, he is without standing under the Authority's Rules and Regulations to file a motion or request for reconsideration of the Authority's Decision of April 5, 1985. Similarly, to the extent the grievant may be requesting clarification of the subject decision, without passing upon whether the Rules and Regulations permit such requests, the grievant is likewise without standing to request any action with respect to that decision.

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Accordingly, and apart from other considerations, the grievant's request is denied.

For the Authority.

Issued, Washington, D.C., April 30, 1985

Jerome P. Hardiman, Acting
Managing Director for Case Processing

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ARBITRATION

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Exceptions Asserted in Appeal

- Award (Continued)

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Denial of Membership

- For Filing a ULP Charge — 17 FLRA No. 110

Vehicles

- Use of Government Vehicles During Other Than Duty Hours — 17 FLRA No. 34

Waiver of Rights

- Contract Waiver Negotiated by a Former Union Waiving Negotiation Rights Consultation — 17 FLRA No. 26
- Contract Waiver of the Right to Negotiate over the Filling of Vacancies by Lateral Reassignments — 17 FLRA No. 30
- Contract Waiver of Union's Right to Negotiate Over Changes in Starting and Quitting Times — 17 FLRA No. 33
- Failure to Submit Proposal During Brief Informal Meeting — 17 FLRA No. 76
- Items Not Specified in the Parties' Agreement — 17 FLRA No. 64
- Provision in Expired Agreement — 17 FLRA No. 26, 17 FLRA No. 33, 17 FLRA No. 117
- Reopen Negotiations Following Vote Against Contract Ratification — 17 FLRA No. 97
- Union's Failure to Respond To Request for its Views Prior to a Policy Decision to Change Conditions of Employment — 17 FLRA No. 40
- Union Not Obligated to Submit Proposals Prior to Formal Negotiations — 17 FLRA No. 76
- Union's Right to Designate a Representative of Its Own Choosing for Notification Purposes — 17 FLRA No. 26

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UNIFORMS

See Arbitration: National Guard Technicians

See Negotiability: National Guard Technicians

UNITED STATES CODE

See Arbitration: Award: - Modified

See Arbitration: Award: - Set Aside

See Arbitration: Exceptions Asserted in Appeal: - Award

See Negotiability: Conditions for Review

5 U.S.C. § 504			17 FLRA No. 67
5 U.S.C. § 504(b)(1)(C)			17 FLRA No. 67
5 U.S.C. § 5335(a)	17 FLRA No. 134 17 FLRA No. 143 17 FLRA No. 145		17 FLRA No. 142 17 FLRA No. 144
5 U.S.C. § 552(a)			17 FLRA No. 92
5 U.S.C. § 552(b)			17 FLRA No. 92
5 U.S.C. § 552a	17 FLRA No. 100		17 FLRA No. 113
5 U.S.C. § 552a(a)(4)			17 FLRA No. 92
5 U.S.C. § 552a(a)(5)			17 FLRA No. 92
5 U.S.C. § 552a(b)(1)-(12)			17 FLRA No. 92
5 U.S.C. § 554			17 FLRA No. 67
5 U.S.C. § 911			17 FLRA No. 63
5 U.S.C. § 913			17 FLRA No. 63
5 U.S.C. § 2302(b)(6)			17 FLRA No. 45
5 U.S.C. § 2302(b)(9)			17 FLRA No. 130
5 U.S.C. § 2302(b)(10)			17 FLRA No. 130

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5 U.S.C. § 3341	17 FLRA No. 88	17 FLRA No. 93
5 U.S.C. § 3502		17 FLRA No. 112
5 U.S.C. § 4301(3)	17 FLRA No. 142	17 FLRA No. 145
5 U.S.C. § 4303		17 FLRA No. 90
5 U.S.C. §§ 5361-5366		17 FLRA No. 14
5 U.S.C. § 5542(a)		17 FLRA No. 63
5 U.S.C. § 5544		17 FLRA No. 63
5 U.S.C. § 5545(a)		17 FLRA No. 15
5 U.S.C. § 5550a		17 FLRA No. 79
5 U.S.C. § 5596	17 FLRA No. 61 17 FLRA No. 40 17 FLRA No. 125 17 FLRA No. 142 17 FLRA No. 144	17 FLRA No. 88 17 FLRA No. 93 17 FLRA No. 134 17 FLRA No. 143 17 FLRA No. 145
5 U.S.C. §§ 5701-5709		17 FLRA No. 116
5 U.S.C. § 6101	17 FLRA No. 83	17 FLRA No. 121
5 U.S.C. § 6101(a)	17 FLRA No. 121	17 FLRA No. 128
5 U.S.C. § 6101(a)(3)		17 FLRA No. 106
5 U.S.C. § 6101(a)(3)(F)	17 FLRA No. 83	17 FLRA No. 128
5 U.S.C. § 6101(b)(2)	17 FLRA No. 55	17 FLRA No. 104
5 U.S.C. § 6101(c)		17 FLRA No. 106
5 U.S.C. § 7512	17 FLRA No. 46 17 FLRA No. 52 17 FLRA No. 59 17 FLRA No. 91	17 FLRA No. 51 17 FLRA No. 53 17 FLRA No. 90
5 U.S.C. § 7701(a)		17 FLRA No. 71
5 U.S.C. § 7701(c)		17 FLRA No. 134

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5 U.S.C. § 7701(c)(1)(B)	17 FLRA No. 45 17 FLRA No. 145	17 FLRA No. 134
5 U.S.C. § 7701(c)(2)(A)		17 FLRA No. 143
5 U.S.C. § 7702(a)(1)		17 FLRA No. 71
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18 U.S.C. § 4204(a)(2)		17 FLRA No. 16
26 U.S.C. § 6103(1)(4)		17 FLRA No. 75
26 U.S.C.A.§ 6103(b)(4)		17 FLRA No. 75
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29 U.S.C. § 158(a)(1)		17 FLRA No. 71
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29 U.S.C. § 158(b)(2)		17 FLRA No. 110
29 U.S.C. §§ 401 et seq.		17 FLRA No. 110
29 U.S.C. §§ 701 et seq.		17 FLRA No. 125
31 U.S.C. §§ 1 et seq.	17 FLRA No. 66	17 FLRA No. 69
32 U.S.C. § 709		17 FLRA No. 23
32 U.S.C. § 709(b)	17 FLRA No. 80	17 FLRA No. 23
32 U.S.C. § 709(e)		17 FLRA No. 37

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41 U.S.C. §§ 40 et seq. 17 FLRA No. 66

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42 U.S.C. § 2000e(j) 17 FLRA No. 118

UNION RIGHTS, RESPONSIBILITIES AND REPRESENTATION

See Negotiability

See Unfair Labor Practices

UNION VIOLATIONS OF § 7116

See Unfair Labor Practices

UNIT DETERMINATION

See Representation

UNIT NAME CHANGE

See Representation

UPWARD MOBILITY

See Negotiability

V

VEHICLES

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WAIVER OF RIGHTS

See Negotiability: Collective Bargaining Agreement

See Unfair Labor Practices

WITHIN GRADE INCREASE

See Arbitration: Compensation

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